Commonwealth of Massachusetts
The Appeals Court

No. 2020-P-0229

CASSOUTO-NOFF & CO.,

Plaintiff-Appellee,

– against –

AMY DIAMOND,

Defendant-Appellant.

ON APPEAL FROM THE ORDER OF THE
BERKSHIRE SUPERIOR COURT, JUDGE JOHN A. AGOSTINI

BRIEF FOR DEFENDANT-APPELLANT

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STATEMENT OF ISSUES PRESENTED

1. Whether an Israeli judgment is entitled to recognition in Massachusetts under G. L. c. 235, § 23A, second par., when it is undisputed on the record that the complaint in the foreign action was not served on Appellant in any manner; and
2. Whether Appellee's cause of action, seeking to hold Appellant personally liable for corporate debts, is repugnant to the public policy of the Commonwealth, such that the Israeli court's judgment against Appellant is not entitled to recognition in Massachusetts under G. L. c. 235, § 23A, third par.

STATEMENT OF THE CASE

Appellant, Amy Diamond, appeals a decision of the trial court to enforce a foreign default judgment issued in Israel in favor of Appellee, Cassouto-Noff & Co.

On or about February 16, 2016, Appellee filed an action in the Berkshire County Superior Court, seeking recognition of a foreign judgment pursuant to G. L. c. 235, § 23A (the "Massachusetts Action"). RAI/11. The complaint in the Massachusetts Action (the "Massachusetts Complaint") alleged that Appellant owed Appellee 334,621 INS (Israeli New Shekels) (equivalent to approximately $85,523.81 U.S. dollars) on account of an October 3, 2015 judgment from the District Court of Tel Aviv in Israel (the "Israeli Judgment"). Id.

On October 25, 2018, a jury-waived trial was conducted in the Berkshire County Superior Court. The evidence consisted of two witnesses, Shmulik Cassouto and Appellant, and seventeen exhibits. RAII/197-469.

On February 19, 2019, the trial court issued its Findings of Fact, Rulings of Law and Order After Jury Waived Trial ("Order"). RAI/19-38. The trial court ordered entry of judgment for Appellee in an amount to

be determined, as well as Appellee's court costs and interest. RAI/37-38.

On April 19, 2019, the trial court issued a Judgment on Finding of the Court, ordering payment payable to Appellee in the amount of $462,205.36. RAI/41. Appellant subsequently moved to vacate judgment pursuant to Mass. R. Civ. P. 60, as the trial court had entered judgment for an erroneous amount (the amount sought in the Massachusetts Complaint was expressed in Israeli New Shekels, but the court entered that amount in U.S. dollars). RAI/42-43. On September 17, 2019, the trial court issued a Corrected Final Judgment, ordering payment to Appellee in the amount of 334,621 INS or the equivalent thereof in U.S. dollars determined at the exchange rate in effect on the day of or the day before payment, with interest, plus Appellee's court costs. RAI/50.

STATEMENT OF FACTS

Appellant is a Berkshire County resident and businessperson specializing in the oil and gas industry. RAII/338-339 (testimony of Appellant). Her background is in investment banking. RAII/338 (testimony of Appellant).

Appellant had an interest in three entities that are relevant to this case. She was the Managing Member of a limited liability company, Bandel Interests, LLC. RAI/21 (Order); RAII/4 (Trial Ex. 2); RAII/343-344 (testimony of Appellant). She and a colleague, Ari Nachmanoff ("Nachmanoff"), were Managing Members of another limited liability company, Bandel East Med, LLC. RAI/21 (Order); RAII/3 (Trial Ex. 1); RAII/342-343 (testimony of Appellant). Appellant and Nachmanoff were also both Managing Directors of a company named Bandel Green East Med Cooperatief U.A. RAI/21 (Order); Vol. 2 pp. 5-20 (Trial Ex. 3); RAII/344 (testimony of Appellant).[1] These three business entities (together, the "Bandel Entities") were formed in 2007. RAI/21 (Order).

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[1] Bandel Green East Med Cooperatief U.A. was the Dutch equivalent of a limited liability company. RAII/151-152 (testimony of Appellant).

The Retainer Agreement

In or around 2013, the Bandel Entities retained the services of Appellee's Israeli law firm in connection with a business venture involving the discovery of gas off the coast of Israel. RAI/20 (Order); RAII/21-22 (Trial Ex. 4); RAII/238-239 (testimony of Appellee); RAII/338-339, 350-351 (testimony of Appellant). The engagement of the Appellee law firm was memorialized in a written retainer agreement (the "Retainer Agreement"). RAII/21-22 (Trial Ex. 4). Appellant signed the Retainer Agreement on behalf of the Bandel Entities. Id. It was uncontested at the trial that the Retainer Agreement was between Appellee and the Bandel Entities and that Appellant signed the Retainer Agreement in a representative capacity. RAII/239 (testimony of Appellee) ("that's the agreement that Ms. Diamond signed on behalf of the Bandel Group…"); RAII/351 (testimony of Appellant). Appellant testified that she signed the Retainer Agreement with the understanding that she personally would not be held liable for the law firm's fees. RAII/352-353. The Retainer Agreement contained no personal guaranty or any other indication that Appellant had personal responsibility. RAII/21-22

(Trial Ex. 4); RAII/312 (testimony of Appellee). Appellee's witness testified that, as a lawyer, he knew how to include a personal guaranty in a retainer agreement but did not do so here. RAII/312 (testimony of Appellee).

The Israeli Action

The Bandel Entities' venture fell through and they were left with expenses in the amount of around $12 million. RAII/354-356 (testimony of Appellant). One of the Bandel Entities, Bandel East Med, LLC eventually filed for bankruptcy. RAII/34-61 (Trial Ex. 8); RAII/62 (Trial Ex. 9). Appellee was listed as a creditor on the bankruptcy petition. RAII/46 (Trial Ex. 8); RAII/355-356 (testimony of Appellant).

Appellee, claiming that it was owed money for work performed for the Bandel Entities, commenced litigation in Israel in December 2014 (the "Israeli Action"). RAII/25-32 (Trial Ex. 6). The complaint[2] named as defendants "Bandel Green East Med Cooperation

[2] The document is entitled "Statement of Claim." RAII/25-32, Trial Ex. 6. Appellee's witness testified that an Israeli statement of claim is equivalent to a complaint in the United States. RAII/264 (testimony of Appellee).

UA," Bandel Interests LLC, Nachmanoff, and Appellant. Id.

Lack of Service of the Israeli Action

Appellee requested leave from the Tel-Aviv Magistrates Court "to serve the pleadings in [the Israeli Action], after being translated into English, outside the jurisdiction, on the Respondents at their place of residence in the U.S. and/or at any other address at which they shall be located." RAII/175 (Trial Ex. 16). The Tel-Aviv Magistrates Court granted this request, allowing service "by registered air mail with a certificate of service or personal service through an international courier company with a certificate of service." RAII/194 (Trial Ex. 16).

Appellee elected to enlist the services of the Berkshire County Sheriff's Department to serve the Israeli complaint on Appellant. In April 2015, Deputy Sheriff Carl Seiger made multiple attempts to serve Appellant without success. RAII/82 (Trial Ex. 14). These attempts are detailed in a signed affidavit made by the Deputy Sheriff. Id. The affidavit concludes with a statement that "I, therefore, return this writ without service" (emphasis added). Id.

There is no dispute that the Deputy Sheriff did not serve Appellant with the Israeli complaint or any other documents in any manner. RAII/328 (testimony of Appellee); RAII/364 (testimony of Appellant). Nor is there any dispute that the Deputy Sheriff never left the documents in question at Appellant's home. RAII/328 (testimony of Appellee). The lower court found that Appellant was not served with the Israeli complaint by hand, by mail or by any other method. RAI/23 (Order) (reciting the attempted service and noting, "For reasons that are not clear the documents were not left at the residence," as permitted under Mass. R. Civ. P. 4(d)(1)).

Appellee made no further attempts to serve Appellant. RAII/330 (testimony of Appellee). There was no mailing to Appellant, as specifically authorized by the Israeli court. Appellee did not apply to the court for any alternative means of service. Id. There is no affidavit of service or proof of service of any kind in the record, other than the Deputy Sheriff's return "without service." RAII/82 (Trial Ex. 14).

There was no evidence presented at trial that Appellant was aware of the nature, substance, or origin of the documents that the Deputy Sheriff

attempted and failed to serve. See, e.g., RAII/82 (Deputy Sheriff's affidavit was silent as to any communication to Appellant or her husband regarding the details of the documents that he attempted to serve). Appellant testified that she could not recall when she first saw the documents in question, nor could she recall when she first became aware of the Israeli Action. RAII/365 (testimony of Appellant). She testified on cross-examination that she saw the Israeli court documents in connection with the Massachusetts Action, but not the Israeli Action. RAII/365, 384-385 (testimony of Appellant). Appellant knew generally that the Israeli venture had left a number of creditors owed money by various entities. RAII/389 (testimony of Appellant). She did not believe she had any personal responsibility for any of the debts. RAII/388 (testimony of Appellant).

There was no evidence that Appellant, who had never been served, appeared, or otherwise participated in the Israeli Action in any way.

The Tel-Aviv Magistrates Court issued final judgment against Appellant on October 3, 2015. The Tel-Aviv Magistrates Court stated in its final judgment that "Ms. Amy Diamond refuses to receive the

relevant documents with Bona fide in the intent of evading the law." RAII/33. The Tel-Aviv Magistrates Court ordered "Bandel Green East Med cooperation Ua," "Bandel Interests Ils," and Appellant[3] (1) to pay Appellee 311,817 INS in damages and 18,906 INS in legal fees and (2) to pay the court 3,898 INS in court fees. Id. This final judgment was the foreign judgment for which Appellee sought recognition and enforcement in the Massachusetts Action.

[3] Nachmanoff, the fourth defendant named in the Israeli Action, was not ordered to make any payments.

STANDARD OF REVIEW

On review of a jury-waived trial, the trial court's legal conclusions are reviewed de novo, and the trial court's findings of fact are reviewed for clear error. See, e.g., Panagakos v. Collins, 80 Mass. App. Ct. 697, 701 (2011) (citing T.W. Nickerson, Inc. v. Fleet Nat'l Bank, 456 Mass. 562, 569 (2010)). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed… [T]he 'clearly erroneous' standard of appellate review does not protect findings of fact or conclusions based on incorrect legal standards." Kendall v. Selvaggio, 413 Mass. 619, 620-21 (1992).

SUMMARY OF THE ARGUMENT

Massachusetts' Foreign Money-Judgments Recognition Act, G. L. c. 235, § 23A (the "Recognition Act"), governs recognition of judgments rendered by foreign courts. Only judgments which are "final and conclusive and enforceable where rendered" are entitled to recognition. G. L. c. 235, § 23A, first par.

A foreign judgment is not conclusive, and therefore does not fall within the ambit of the Recognition Act, if "the foreign court did not have personal jurisdiction over the defendant." G. L. c. 235, § 23A, second par. Acquisition of personal jurisdiction over a defendant requires service of process or an appropriate substitute. The exercise of jurisdiction by the foreign court must meet the standards under Massachusetts law to satisfy the Recognition Act. In this instance, there was no service of process on Appellant or an appropriate substitute, nor was the lack of service excusable.

Additionally, a foreign judgment is not recognizable if the cause of action upon which the judgment is based is repugnant to the public policy of Massachusetts. G. L. c. 235, § 23A, third par. Here,

the foreign judgment was repugnant to Massachusetts' public policy as it disregarded the corporate form and held Appellant personally liable for a corporate debt.

ARGUMENT

I. The Recognition Act

In the Massachusetts Action, Appellee sought recognition of the Israeli Judgment pursuant to G. L. c. 235, § 23A. Massachusetts, along with the majority of other states in the Union, has enacted a version of the Uniform Foreign Money-Judgments Recognition Act. The Recognition Act sets forth the conditions that must be met before Massachusetts courts may recognize (and, by extension, enforce) a foreign judgment. Pursuant to the statute, there are various reasons a foreign judgment will not be recognized in the Commonwealth. There are two such reasons at issue in this appeal: (1) lack of personal jurisdiction over Appellant by the foreign court (G. L. c. 235, § 23A, second par.), and (2) violation of the public policy of the Commonwealth (G. L. c. 235, § 23A, third par.).

II. The Israeli Judgment Was Not Conclusive, and Therefore Does Not Fall Within the Scope of the Recognition Act, Because the Israeli Court Lacked Personal Jurisdiction Due to Lack of Service.

Under the Recognition Act, a "foreign judgment that is final and conclusive and enforceable where rendered… shall be conclusive between the parties to the extent that it grants or denies recovery of a sum of money." G. L. c. 235, § 23A, first par. "A foreign judgment shall not be conclusive [and therefore is not entitled to recognition under the Recognition Act] if… the foreign court did not have personal jurisdiction over the defendant…" G. L. c. 235, § 23A, second par.

The Recognition Act "clearly requires that the rendering court have personal jurisdiction over the defendant in order for the resulting judgment to be recognized in Massachusetts." Evans Cabinet Corp. v. Kitchen Int'l, Inc., 593 F.3d 135, 142 (1st Cir. 2010); see also Franco v. Dow Chemical Co., No. CV 03-5094 NM, at *6-8 (C.D. Cal. Oct. 20, 2003) (refusing to recognize foreign judgment under California statutory provision, equivalent to G. L. c. 235, § 23A, second par., on the grounds that the named defendant had never been brought within the jurisdiction of foreign court through service). In

this instance, as explained below, jurisdiction was lacking because of lack of service of process upon Appellant.

a. Determining Whether the Court That Rendered the Judgment Had Personal Jurisdiction Requires Analysis Under Massachusetts Law.

As an initial matter, the trial court adopted a two-part analysis in determining whether the exercise of personal jurisdiction by the foreign court was proper: first, analyzing whether the rendering court (i.e., Israel) properly exercised jurisdiction pursuant to its own laws, and second, analyzing whether exercise of such jurisdiction would also comply with the law of the recognizing court (i.e., Massachusetts). See RAI/24-25 (Order), citing Evans Cabinet Corp., 593 F.3d at 143.

The purpose of analyzing the exercise of personal jurisdiction through the lens of the recognizing forum "is to ensure that the rendering court not only possessed jurisdiction at the time of judgment but also that the rendering court's procedures comported with United States due process standards." Evans Cabinet Corp., 593 F.3d at 143, n. 10. When asked to enforce a judgment obtained in a foreign country, courts must evaluate whether the proceedings in the

underlying case—including the means of serving process—comport with domestic due process requirements. See, e.g., de la Mata v. American Life Ins. Co., 771 F.Supp. 1375, 1386 (D.Del. 1991), aff'd, 961 F.2d 208 (Table) (3d Cir. 1992) ("A determination that there was valid service of process under [a foreign country's] law does not end the analysis. The court must also determine whether service of process under a foreign country's laws comports with traditional American notions of due process").

In this instance, whether analyzed under the two-part test or under the law of the recognizing forum only, the judgment at issue does not meet the due process test. Because jurisdiction and attendant due process was lacking, the judgment should not have been recognized in Massachusetts.[4]

b. Personal Jurisdiction is Dependent Upon Service of Process.

American courts have long recognized that in order to give validity to the proceedings of a tribunal, a defendant "must be brought within [the

[4] Because personal jurisdiction was lacking under Massachusetts law, it was unnecessary to explore the depths of Israeli law.

tribunal's] jurisdiction by service of process within the State, or his voluntary appearance." Pennoyer v. Neff, 95 U.S. 714, 733 (1877). "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation… to which he has not been made a party by service of process." Hansberry v. Lee, 311 U.S. 32, 40 (1940) (citing Pennoyer). "Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant," and absent such service or a waiver thereof, "a court ordinarily may not exercise power over a party the complaint names as a defendant." Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999).

This Court has previously recognized the "integral relationship between proper service and the court's acquisition of personal jurisdiction over the defendant." Wang v. Niakaros, 67 Mass. App. Ct. 166, 172 (2006). As stated in the Wang decision,

> [It is] well-settled that acquisition of personal jurisdiction over a defendant cannot be satisfied without proper service of process or an appropriate substitute. (emphasis added)

Id. While the Wang decision acknowledged that certain technical deficiencies in service may be excusable, the overarching rule articulated in Wang is clear: A court may not exercise jurisdiction over a defendant if that defendant was never served.

The trial court did not apply the Wang standard, but instead found sufficient "notice" by application of a different standard. This was the application of an incorrect legal standard and reversable error.

The trial court also mistakenly divorced personal jurisdiction from service of process and due process. This Court made it clear in Wang that they are not separable. See Wang, 67 Mass. App. Ct. at 172 ("It is thus well settled that acquisition of personal jurisdiction over a defendant cannot be satisfied without proper service of process"). In doing so, the lower court did not accept and apply the standard under Wang, which is necessary to satisfy the service and due process requirements and, by extension, exercise of personal jurisdiction over Appellant.

Because the requirements of due process must be met under Massachusetts law to recognize the judgment, the service of the Israeli complaint must satisfy the Massachusetts legal standard articulated in the Wang

decision, in order for the Israeli Judgment to be conclusive under the Recognition Act. See, e.g., Franco, No. CV 03-5094 NM, at *6-8 ("Foreign courts acquire personal jurisdiction over a defendant by effective service of process," without which a foreign judgment is not conclusive).

1. The Israeli Court Did Not Acquire Personal Jurisdiction Over Appellant By Proper Service.

As set forth in Wang, acquisition of personal jurisdiction over a defendant may be satisfied with proper service of process. Wang, 67 Mass. App. Ct. at 172.

The requirements of service of process under Massachusetts law are articulated in Mass. R. Civ. P. 4, as amended, 402 Mass. 1401 (1988). Typically, proper service of process under this rule is necessary not only for a court to acquire personal jurisdiction over a defendant, but also for a party to satisfy the due process requirements of notice and an opportunity to be heard. Fried vs. Wellesley Mazda, Mass. App. Div. No. 08-ADMS-40032, 2010 Mass. App. Div. 36, at *2 (Mass. App. Div. Mar. 9, 2010).

There is no question that the requirements of Mass. R. Civ. P. 4 were not met in this instance. There are three ways to serve an individual under Rule 4: (1) by personal delivery, (2) by leaving copies at the individual's "last and usual place of abode," or (3) by service on an authorized agent.

It is undisputed that none of these methods of service occurred in this case and there is no proof of service on Appellant in the record. At trial, uncontroverted evidence showed that the Berkshire County Deputy Sheriff attempted service upon Appellant, but the return of service indicates that he returned the writ "without service" (emphasis added). RAII/82 (Trial Ex. 14). There is no indication in the record that the Sheriff's Department handed papers to Appellant, left the summons and complaint at her address, mailed the papers to her, or delivered papers to anyone on her behalf. Id.; RAII/328, 330 (testimony of Appellee); RAII/364 (testimony of Appellant).

Appellee's utter failure to serve the pleadings upon Appellant is particularly inexcusable given that the burden of service was not onerous. Appellee had the option, under Mass. R. Civ. P. 4, to achieve service by delivering the summons and complaint to

Appellant personally, by leaving copies at Appellant's "last and usual place of abode," or by delivering a copy to an agent authorized to receive service of process. Given that the Deputy Sheriff knew where Appellant lived and visited her "last and usual place of abode" on multiple occasions, it would have been trivially easy for him to leave the pleadings at Appellant's house.[5] See RAII/82 (Trial Ex. 14). There is no question that he did not do so. Id.

2. The Israeli Court Did Not Acquire Personal Jurisdiction Over Appellant Through an Appropriate Substitute to Service of Process

As stated in Wang, "acquisition of personal jurisdiction over a defendant cannot be satisfied without proper service of process or an appropriate substitute." Wang, 67 Mass. App. Ct. at 172. In other words, even in circumstances where a plaintiff is excused from strict compliance with the procedures of

[5] There is no explanation in the record as to why the Sheriff's Department did not leave the summons and complaint at Appellant's "last and usual" address. See Comm'r of Revenue v. Carrigan, 45 Mass. App. Ct. 309, 313 (1998) (no explanation why process was not posted in a timely manner on the front door, which would have rendered defendant's whereabouts irrelevant).

Mass. R. Civ. P. 4, the alternate procedure employed must be an "appropriate substitute."

The trial court was not troubled by the clear lack of service under Mass. R. Civ. P. 4 because it held that "there is nothing in the [Recognition] Act that requires formal service of process, particularly pursuant to Rule 4." RAI/33 (Order). At the same time, the court acknowledged that "notice must comply with due process and that Rule 4 is simply a mechanism to insure that it does." RAI/34 (citing Wang, 67 Mass. App. Ct. 166).[6]

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[6] In its order, the trial court focused on a part of the Recognition Act which states that "A foreign judgment shall not be recognized if… the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend…" G. L. c. 235, § 23A, third par.; RAI/11 (Order).

This portion of the Recognition Act does not replace the requirement for the rendering court to have properly acquired personal jurisdiction by service of process. The third paragraph of the Recognition Act allows the Massachusetts court to refuse recognition, even where jurisdictional requirements are met, if it finds lack of adequate "notice" and "sufficient time" to defend. This is an additional protection for individuals like Appellant--above the floor of the proper exercise of jurisdiction--but it does not replace the jurisdiction (and service and due process) requirements embodied in the second paragraph of the Recognition Act. Treating the notice provision as if it replaced and removed the service facet of the

While the nuances of service requirements differ among different jurisdictions, the Supreme Court has stated that "[s]ervice of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action." Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988); RAI/33 n. 9 (Order) (quoting the same); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstance, to apprise interested parties of the pendency of the action and

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jurisdictional requirement was the fundamental legal error in the lower court's decision.

The second paragraph of the Recognition Act, on which Appellant's argument regarding service is based, addresses situations in which a foreign judgment is not entitled to recognition because it does not even meet the threshold requirement of conclusiveness. G. L. c. 235, § 23A, second par.

It is also true that Appellant did not receive notice of the proceedings in sufficient time to enable her to defend and that this is an additional basis for reversing the lower court's judgment. The Court need not reach that issue because the judgment does not satisfy the personal jurisdiction requirement and therefore falls outside the scope of the Recognition Act entirely.

afford them an opportunity to present their objections").

As the trial court itself noted, "Service of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action" (emphasis added). RAI/33 n. 9 (Order) (quoting Volkswagenwerk, 486 U.S. at 700. No such delivery of documents took place in this instance.

Appellee made no attempt to effect service upon Appellant in some other manner after the Deputy Sheriff failed to deliver documents to her. For instance, when the Tel-Aviv Magistrates Court granted Appellee's request to serve Appellant outside the jurisdiction, the court allowed service "by registered air mail with a certificate of service or personal service through an international courier company with a certificate of service." RAII/194 (Trial Ex. 16). The trial court also noted other available procedures for service, including Fed. R. Civ. P. 4(f)(1) and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. RAI/35 (Order).

Rather than avail itself of these options, Appellee chose to engage the Sheriff's Department and, when service was not accomplished through the Deputy Sheriff, made no further effort to complete service. Instead, Appellee returned to the Tel-Aviv Magistrates Court, seeking default judgment on the meritless grounds that Appellant "evaded" service. RAII/33 (Trial Ex. 7).

In disregarding the analysis set forth by this Court in Wang, the trial court applied an incorrect legal standard and reached a conclusion that despite the lack of "proper service of process or an appropriate substitute," Wang, 67 Mass. App. Ct. at 172, there was adequate notice. Because the legal standard applied was incorrect, the subsidiary findings are not entitled to deference because the "clearly erroneous" standard of appellate review "does not protect findings of fact or conclusions based on incorrect legal standards." Kendall, 413 Mass. at 620-21.

"When notice is a person's due, process which is a mere gesture is not due process." Mullane, 339 U.S. at 314 (1950). The means of service employed "must be such as one desirous of actually informing the

absentee might reasonably adopt to accomplish it." Id. Here, Appellee, in its eagerness to obtain a default judgment against Appellant, made no effort to accomplish service once its attempt with the Sheriff's Department failed.

Service does not occur through word of mouth or through general knowledge of a controversy. It occurs through the "formal delivery of documents" that "charge the defendant with notice of a pending action." Volkswagenwerk, 486 U.S. at 700. Such service simply did not occur in this instance.

c. There Was No Justification for the Lack of Service.

As this Court noted in the Wang decision, "technical deficiencies" in service may, under limited circumstances, be justified. Wang, 67 Mass. App. Ct. at 171. While it did not reach such a determination, the Wang Court postulated that knowledge of the pleadings, coupled with a pattern of delay and evasion, "might form an adequate basis for the judge to find that actual knowledge and continued participation in the litigation by [the defendant] excused [the plaintiff] from specific compliance with Rule 4." Id. These circumstances that might excuse

failure to accomplish service are not present in this case.

1. The Complete Failure to Effect Service Was Not a "Technical Deficiency."

The Wang decision's discussion of circumstances that might excuse failure to comply with Mass. R. Civ. P. 4 hinged upon the presence of a technical deficiency. Courts have interpreted a "technical deficiency" in service to mean that service occurred, but there was a minor error in the method of service or the contents of the documents served. See, e.g., Fried, Mass. App. Div. No. 08-ADMS-40032, at *2 (service by certified mail on registered agent constituted technical deficiency); Libertad v. Welch, 53 F.3d 428, 434-435, 440-441 (1st Cir. 1995) (failure to state name of person served on summons received by defendant constituted technical deficiency). The failure to make any service whatsoever, whether compliant with Rule 4 or otherwise, is not simply a technical deficiency in service: it is no service at all.

2. Appellant Did Not Have Actual Knowledge of the Pleadings in the Israeli Action, Nor Would Knowledge Alone Justify the Failure to Make Service.

The Wang Court's discussion of circumstances that might excuse a technical deficiency in service also assumed actual knowledge of the pleadings. Wang, 67 Mass. App. Ct. at 171. In this case, there was no evidence of actual knowledge.

The lower court focused on Appellant's knowledge of the existence of the case, but contrary to the trial court's decision, Appellant had no specific knowledge of the claim when the Deputy Sheriff attempted service. There is no evidence that she knew the identity of the plaintiff in the Israeli Action, how much the claim was for, where the case was pending, or the time frame for her to respond. The trial court's leap of logic that because Appellant had knowledge that Appellee "was pressing her for payment of the legal fees" and had sent her demand letters, she therefore had knowledge of the lawsuit itself, constitutes clear error. RAI/36 (Order). See, e.g., Wang, 67 Mass. App. Ct. at 170 ("Nor did the exchange of [demand letters], which admittedly referred to money damages, remedy the lack of service; demand

letters are as often the last step in a dispute as the first, and a recipient is under no obligation to assume that threats of litigation will be carried out").

The trial court's inference that Appellant "had knowledge of the lawsuit prior to the default judgment entering and was afforded the opportunity to be heard" was application of an incorrect legal standard (see Section II(b), supra) and was otherwise lacking in evidentiary support. RAI/36 (Order). Appellant testified that she could not recall when she first became aware of the Israeli Action. RAII/384 (testimony of Appellant). Given that Appellee made no further attempts to serve her after the Deputy Sheriff failed to complete service, the inference that Appellant knew that a lawsuit was actually pending against her in Israel, much less the details of that lawsuit, is not supportable. Notably, creditors' claims against Bandel East Med LLC alone totaled $1,668,126.00 when it filed bankruptcy, and the Bandel Entities together were left with expenses of around $12 million. RAII/46 (Trial Ex. 8); RAII/355-356 (testimony of Appellant). The trial court's conclusion that Appellant somehow knew the Deputy Sheriff was

delivering an action encompassing this one creditor's claim is not well founded.

In its decision, the trial court placed emphasis on Commonwealth v. Olivo, 369 Mass. 62 (1975). This emphasis was misplaced. In Olivo, the Supreme Judicial Court held that personal service of English language notices on tenants who spoke "little English" and were "unable to read English" constituted actual notice of orders to vacate unsafe housing. Id. at 63. The Olivo decision articulated the following rule:

> [W]here a party actually receives notice which would be constitutionally sufficient if the party were not under a disability, that notice is constitutionally sufficient as to a person actually under a disability if (1) it would put a reasonable person on notice that inquiry is required, (2) further inquiry would reveal the facts necessary to understand the nature of the proceeding and the opportunity to be heard, and (3) the party's disability does not render him incapable of understanding the need for such inquiry.

Id. at 69. Applying this rule to the tenants in the Olivo case, the Supreme Judicial Court stated, "in-hand service of an official order by a constable was sufficient to put a reasonable person on notice that the order was important and, if not understood, required translation." Id. at 70.

As noted above, the trial court placed emphasis on the Olivo decision in its determination that Appellant received due process. However, the Olivo decision was premised on the fact that the individuals in question actually received personal service of a notice--i.e., a physical document which, while they did not fully understand its substance, could be translated by someone who would be able to explain its import. Id. at 70. The tenants did not simply have a vague understanding that someone had tried to serve them with something; they were actually served and had the document in their possession. Id.

In contrast, in the instant case, it is undisputed that Appellant received no document. There was no evidence presented that Appellant was aware that the documents that the Deputy Sheriff attempted and failed to serve were pleadings in a litigation, much less the court from which they originated or the party on behalf of whom service was attempted.[7]

Cases on the Recognition Act in Massachusetts are very limited. However, courts in other jurisdictions

[7] As noted at trial, Appellee was not the only entity claiming entitlement to payment in connection with the Bandel Entities. See, e.g., RAII/389-396.

that have adopted their own versions of the Uniform Foreign Money-Judgments Recognition Act have stressed that in order for a court to obtain personal jurisdiction over a defendant, that defendant must be served with documents that inform that defendant of basic information about the case against him.

For instance, in Julen v. Larson, 25 Cal.App.3d 325 (1972), a California appeals court affirmed the trial court's refusal to recognize a foreign judgment under California's version of the Recognition Act, on the grounds that the foreign court did not acquire personal jurisdiction over the defendant pursuant to Cal. Code Civ. Proc. § 1713.4 (equivalent to G. L. c. 235, § 23A, second par.). As the appeals court stated, "the process served must give defendant sufficient notice of the pending foreign proceedings to satisfy the requirements of due process of law." Julen, 25 Cal.App.3d at 328.

> Notice is legally sufficient if it is reasonably calculated to impart knowledge of an impending action… Normally this information should include the location of the pending action, the amount involved, the date defendant is required to respond, and the possible consequences of his failure to respond.

Id. at 328. The plaintiff's failure to ensure that the defendant received the bare minimum of necessary information meant that notice under the law of the recognizing forum was inadequate and, therefore, personal jurisdiction was lacking. Id.

Further, even if there were evidence that Appellant had "actual knowledge" of the Israeli Action, the Wang decision makes clear that knowledge, on its own, does not excuse failure to comply with service requirements. See Wang, 67 Mass. App. Ct. at 171 (noting factors in addition to knowledge, including "a pattern of delay and evasion" and "participation in the litigation," which might excuse "specific compliance" with Mass R. Civ. P. 4 when coupled with actual knowledge). As explained in more detail in below, none of these factors is applicable in this instance.

3. Appellant Did Not Evade Service, Nor Would Evasion Alone Justify the Failure to Make Service.

As noted in Wang, evasion is a factor that may, along with other considerations, excuse a technical deficiency in service.[8] Wang, 67 Mass. App. Ct. at 171. As explained below, Appellant did not evade service, nor would evasion in and of itself justify Appellee's complete failure to effect service.

In its Order, the trial court stated, "The Israeli court found that the notice was adequate given the defendant's attempt to avoid service and the defendant does not argue otherwise." RAI/35 (Order). The Israeli court's final judgment speaks for itself, and Appellant does not contest the veracity of the document in evidence. RAII/33. However, to the extent that the trial court determined that Appellant conceded that she did, in fact, evade service, Appellant did not concede any such point.

As argued at trial, Appellant did not hide, did not pretend not to be home, or do anything else that

[8] Again, the complete failure to ensure that Appellant received documents in this case cannot fairly be considered a "technical deficiency" in service. It was not service at all.

would equate to evading service. See, e.g., RA Vol. 2. P 82 (Trial Ex. 14); RAII/224-25. She simply declined to assist the Sheriff's Department in serving her. RAII/82 (Trial Ex. 14).

As the trial court correctly noted, a defendant is not obligated to facilitate service. RAI/18. Not arranging to accept service is different from evading service. See, e.g., Carrigan, 45 Mass. App. Ct. at 313 ("While the record here indicates that the defendant did nothing to facilitate service of process upon him, we are not persuaded that it proves his intent to evade process"). The same conclusion follows here. There was no evasion by Appellant.

Moreover, even if Appellant had attempted to evade service, this Court has previously made clear that evasion in and of itself does not exempt a party from compliance with rules of service: a defendant must have "deliberately and unfairly evaded service and it is reasonably certain that defendant has actual notice of the lawsuit" (emphasis added). Wang, 67 Mass. App. Ct. at 171 (quoting U.S. to Use of Combustion Sys. Sales, Inc. v. Eastern Metal Products and Fabricators, 112 F.R.D. 685, 688 (M.D.N.C. 1986)). Here, as explained above, there is no such reasonable

certainty that Appellant had actual notice of the lawsuit against her in Israel. See, e.g., RAII/365, 384 (testimony of Appellant). To the contrary, having never received copies of the pleadings or participated in the litigation in any way, it is reasonably certain that Appellant did not have actual notice of the Israeli Action.

4. Appellant Did Not Participate in the Israeli Action.

A defendant may waive technical deficiencies in service by actually participating in the litigation. See, e.g., Wang, 67 Mass. App. Ct. at 172-173 (citing Vangel v. Martin, 45 Mass. App. Ct. 76, 78 (1998) (defendant's conduct of discovery and motion practice constituted waiver of defense of improper service); Sarin v. Ochsner, 48 Mass. App. Ct. 421, 422-23 (2000) (defendants' appearance at hearing and participation in motion practice constituted waiver of defense)).

Here, there is no dispute that Appellant never participated in the Israeli Action. To the extent that participation in litigation may justify a technical deficiency in service, there was no participation in the underlying lawsuit that would excuse Appellee's complete failure to effect service.

In sum, while the Israeli court apparently accepted the Deputy Sheriff's "attempted" but ultimately aborted service as sufficient, this non-service was not adequate to satisfy the applicable domestic due process requirements. Nor could the failure to accomplish service be excused by, for instance, Appellant's actual notice and participation in the Israeli Action. See, e.g., Wang, 67 Mass. App. Ct. at 171. Therefore, under the Recognition Act, the requirements of due process have not been met and the Israeli Judgment was not conclusive under G. L. c. 235, § 23A, second par.

III. Massachusetts May Not Recognize the Israeli Judgment Because the Cause of Action Against Appellant Violated Massachusetts' Public Policy

Under G. L. c. 235, § 23A, third par., a "foreign judgment shall not be recognized if… the cause of action on which the judgment is based is repugnant to the public policy of this state." In this instance, the Israeli Judgment holding Appellant personally liable for a corporate debt violates Massachusetts' public policy.

It is the clear and established policy of the Commonwealth that corporations are liable for their own corporate debts, and that individuals will not bear the burden of corporate debts solely by virtue of their roles within a corporation. With regard to limited liability companies, like the Bandel Entities, this policy is codified in Massachusetts' General Laws, under which

> the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member or manager of a limited liability company shall be personally liable, directly or indirectly, including, without limitation, by way of indemnification, contribution, assessment or otherwise, for any such debt, obligation or

> liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

G. L. c. 156C, § 22.

Likewise, Massachusetts courts have long recognized that individuals are not personally liable for the debts of a corporation, absent fact-specific considerations that would allow a court to disregard the corporate form. See, e.g., My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614, 619 (1968) (piercing of the corporate veil is reserved only for "rare particular situations"); Searcy v. Paul, 20 Mass. App. Ct. 134, 139-140 (1985) (no basis to disregard corporate fiction where there is "no flagrant or relevant disregard of corporate barriers" and "no fraud").

The Supreme Judicial Court has noted that there is a "strong interest in respecting corporate structures." Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 561 (2008). The Commonwealth also has a strong public policy favoring the separation of corporate entities from their principals. This serves the important goal of facilitating commerce and encouraging individuals to participate in business

activity. For that reason, disregarding the corporate entity occurs only in "rare particular situations" to prevent "gross inequity." Evans v. Multicon Const. Corp., 30 Mass. App. Ct. 728, 732 (1991).

In this case, Appellee's claims in the Israeli Action hinged upon its alleged right to payment under the Retainer Agreement. See RAII/25-32 (Trial Ex. 6). The Retainer Agreement was formed between Appellee and the Bandel Entities, and while Appellant signed the Retainer Agreement, it is undisputed that she did so on behalf of the Bandel Entities and not in a personal capacity. RAII/21-22 (Trial Ex. 4); RAII/239 (testimony of Appellee); RAII/351 (testimony of Appellant). The Retainer Agreement did not contain any personal guaranty provision, and Appellant testified that she signed the Retainer Agreement with the understanding that she would not be held personally liable for fees under the Retainer Agreement. RAII/312 (testimony of Appellee); RAII/352-353 (testimony of Appellant).

There was no evidence presented at trial that would have justified an inquiry into piercing the corporate veil under Massachusetts law, nor that any such inquiry made by the Israeli court.

Appellee's cause of action against Appellant, seeking to hold her personally liable for the Bandel Entities' corporate debts, was "repugnant to the public policy of the Commonwealth" (G. L. c. 235, § 23A, third par.) of respecting the corporate form and protecting individuals from shouldering the liabilities of corporations, as codified in G. L. c. 156C, § 22 and reinforced in case law. The Israeli court's decision to grant judgment in favor of Appellee on this cause of action, without any inquiry into the propriety of piercing the corporate veil, is similarly repugnant to the public policy of Massachusetts.

Because the Israeli Judgment against Appellant was repugnant to the public policy of the Commonwealth, the trial court erred in its decision to recognize the Israeli Judgment.

CONCLUSION

For the reasons stated above, the trial court erred in its determination that the Israeli Judgment should be recognized in the Commonwealth. Because Appellee entirely failed to effect service, the Israeli court rendered its judgment without obtaining personal jurisdiction over Appellant, and therefore its judgment was not conclusive (and therefore not entitled to recognition) under the Recognition Act. G. L. c. 235, § 23A, second par.

Additionally, Appellee's cause of action against Appellant, seeking to hold her personally liable for corporate debts, is repugnant to the clearly-stated and codified public policy of the Commonwealth, and, therefore, the Israeli Judgment in favor of Appellee is not entitled to recognition in Massachusetts. G. L. c. 235, § 23A, third par.

Therefore, the trial court's judgment should be reversed, the Massachusetts Complaint should be dismissed, and judgment should enter for Appellant with costs and such other and further relief as the Court deems just and proper.

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CERTIFICATE OF COMPLIANCE

I, David Valicenti, certify that this brief complies with the Rules of Appellate Procedure pertaining to the filing of briefs, including, but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction).

I further certify compliance with the applicable length limit of Rule 20. The font utilized in this brief is a monospaced font, specifically Courier New. The font size is 12 points. The number of characters per inch is ten. The margins on each page of the brief are 1 inch at top and bottom and 1.5 inches on either side. There are 43 non-excluded pages in this brief, beginning on page 8 and ending on page 50. There are 97 excluded pages in this brief, comprised of the cover, table of contents, table of authorities, signature block, addendum, certificate of service, and certificate of compliance.

/s/David Valicenti
David Valicenti, Esq.

ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss. **SUPERIOR COURT**
CIVIL NO. 16-0050

CASSOUTO-NOFF & CO.
Plaintiff

v.

AMY DIAMOND
Defendant

FINDINGS OF FACT, RULINGS OF LAW AND ORDER AFTER JURY WAIVED TRIAL

This case emanates from a default judgment issued in Israel for the payment of attorney's fees. The plaintiff asserted a claim to recognize and enforce the judgment in the United States. The defendant has interposed the defenses of personal jurisdiction, violation of public policy and *forum non conveniens.*

PRIOR PROCEEDINGS AND BACKGROUND

The complaint was filed in February 2016, and included a Final Judgment, in both Hebrew and English as issued by an Israeli Court. After an uneventful pre-trial period, a one day jury-waived trial commenced on October 25, 2018. The evidence consisted of two witnesses and 17 exhibits. The parties were provided the opportunity to submit requests for findings of facts and rulings of law.

Based upon the evidence presented at the hearing, the Court makes the following findings of fact and rulings of law.[1]

FINDINGS OF FACT

The facts surrounding the underlying litigation that engendered the attorney's fees are not in great dispute. Although many are not pivotal to the issues before the court, they provide the situation and context for the litigation.

There were four defendant sued in Israel in the Tel Aviv-Yaffo Magistrates Court;[2] two business entities and two individuals. Bandel Green East Med Cooperation

[1]The Court reserves its rights to make additional findings of fact in the Discussion section of this Decision.

UA, Bandel Interests, LLC, (collectively the "Bandel Group"), Ari Nachmanoff and the defendant in this case, Amy Diamond. The Bandel Group owned an option to purchased eight percent of the "Shimshon," "Daniel East" and "Daniel West" gas and oil licenses that were held by ATP East Med Number I B. V. ("ATP").[3] These licenses permitted the exploration for oil and gas on the shore of the Mediterranean under the control of Israel. At some point, ATP encountered financial problems that forced it into bankruptcy in Israel. An Israeli court appointed a receiver and trustees to oversee the bankruptcy proceedings.

In December 2012, the bankruptcy trustees petitioned in court for an order compelling the Bandel Group to either exercise the option to purchase the licenses within seven days or lose this right. Faced with the possible forfeiture of its option, the Bandel defendants sought legal counsel in Israel to address this situation. After receiving a reference from another law firm, Amy Diamond contacted the law firm of Cassuto-Noff and discussed the seriousness and immediacy of the situation. The contact was made by telephone from outside Israel. After discussing the matter, Cassuto-Noff agreed to represent the Bandel Group. The parties entered into a Fee Agreement for legal services related to the retention of Bandel's contractual interests in the leases.

The "Fee Agreement" identifies the parties to the agreement in the following manner,

> "We the undersigned would like you to represent us in our legal action and proceedings against Bandel Group and its subsidiaries, including Bandel Green East Med Cooperation U.A....in relation to the Bandel's rights in the oil and gas licenses "Shimshom" and "Daniel...."

The agreement is signed by the defendant Amy Diamond on the signature line that identifies the parties as "Bandel Group and the companies on behalf of it." There is no date on the document, however, from correspondence from the defendant to the law firm, it appears that the agreement was signed and sent to the firm on February 10, 2013. Ms. Diamond indicated that, more than likely, she had counsel review the fee agreement. Although not stated, I infer that it was Israeli counsel.

The Fee Agreement consists of ten numbered provisions essentially related to the legal fees and expenses, which are billed on an hourly basis. Any disagreement will result in arbitration, with the arbitrator selected by the Israel Bar and held in Israel under Israeli law. The final provision specifies that the Fee Agreement is governed exclusively by Israeli law. "The courts of the state of Israel will have the sole jurisdiction over any disputes arising from this covenant."

Given the urgency of the impending seizure of the option, Cassouto-Noff started immediately on December 12, 2012, and spent considerable time in December, January

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[2] For reasons that are unclear to me, this court is also referred to as the "Tele-Aviv Magistrates Court."
[3] The documents reflect that the initial agreement concerning the leases was with ATP Oil & Gas Corporation.

and February 2013 to present and argue it position in the court considering the bankruptcy petition. The lead counsel was Shmulik Cassouto, a trial attorney with 20 years of experience.

Ari Nachmanoff came to Israel in January 2013 to assess the situation and assist the legal team. Ms. Diamond came to Israel, on February 13, 2013, and actually attended a court hearing in the District Court, as well as participating in discussions to resolve the matter with the trustees and Isramco, the owner of the licenses.[4] Ms. Diamond also stated that she had an investor come to court with her as she was hoping that the investor would provide the resources to allow the project to continue. She was in Israel on February 27, two weeks later to attend a dinner with counsel. Ms. Diamond stated that she came to Israel "because she had contractual interest in the lease."

To digress a bit, Amy Damond is the Managing Member of Bandel Interests, LLC. Both she and Steven Ari Nachmanoff are Managing Members of Bandel East Med, LLC, and both are Managing Directors of Bandel Green East Med Cooperatief U.A. These business entities were formed in 2007.

Ms. Diamond was involved in investment banking for 20-25 years. Her area of expertise is in energy, specifically offshore oil and gas exploration, and the financing of such endeavors. An opportunity arose in 2011 when a new basin in the Mediterranean opened up off Israel. An Israeli firm did seismic studies that were promising and Ms. Daimond and her partner Ari Nachmanoff sought to enter the field as oil and gas producers by obtaining leases to explore for gas reserves. She contacted exploration "operators" also known as "drillers" in the United States to evaluate the nature and extend of the underground reserves. She was able to get ATP, as a joint venturer, to invest substantial money in searching for potential offshore oil and gas reservoirs to drill an exploratory well in the basin to assess the deposits. If successful, such a site could yield hundreds of millions of dollars. However, oil and gas exploration is an expensive, dangerous and risky business. Ms. Diamond indicated that 80% of the time such efforts are unsuccessful. Ms. Diamond stated that this adventure was a "huge risk" but she decided to take it.

The documents reflect that the option agreements were between Bandel Interests, LLC and ATP. These agreements were assigned to Bandel East Med, LLC, which, in turn, assigned its right to Bandel Green East Med Cooperatief U. A., a Dutch cooperative. None of the Bandel business entities hold any assets, currency or property. The only asset in these business entities was the option rights. The companies had no bookkeeper or kept any accounts or financial records.

ATP commenced drilling operations in 2011 and discovered gas but not at the level anticipated. In August 2011, ATP went into bankruptcy. A large Israeli law firm, Mietar from Ramat Gan represented both the interest of Isramco and the Bandel Group. Because of a conflict of interest, the Mietar law firm suggested that the Bandel Group

[4] Isramco, is an Israeli business that owns interests in oil and gas resources.

retain separate counsel and recommended Cassouto-Noff. This recommendation was accepted by Ms. Diamond.

During the course of the representation by Cassouto-Noff, there were continuing communications and correspondence between the attorneys, Ms. Diamond and Mr. Nachmanoff.[5] With respect to Ms. Diamond, she received two requests for a signed fee agreement, which she responded to on February 10, with the executed Fee Agreement.

Attorney Cassouto testified, and I specifically credit his testimony, that Ms. Diamond repeatedly declared that, "She was Bandel" and that she would be personally responsible for the legal fees and agreed to pay them. Given that the Bandel Group possessed no assets, except the options, to pay for such legal services, this is neither surprising nor inconsistent with standard business practices.

On February 25, 2013, Ms. Diamond send an email to the firm that states:

> "Thanks you so much for you and your team's help this week. Hopefully we will end up with an approved agreement that proves workable for all sides.
>
> "can one of you send a copy to me this morning of the submitted agreement? "I do not have that in my files or the Nda that was signed with the trustees."

A decision from the Israeli court was issued on February 26, 2013, in favor of the Bandel Group thereby safeguarding its rights in the option. Specifically, the court affirmed the negotiated resolution between the Bandel Group and the Trustees and denied the objections from the other creditors. The Bandel Group retained the oil and gas option.

With the legal matter concluded, a bill for legal services was sent to Amy Diamond on February 20, 2013, seeking $54,689.50, in legal fees and expenses. The bill was not only directed to Ms. Diamond for payment by her, it did not include the names of any of the Bandel business entities. A second bill with additional fees was sent on March 4, 2013 to Ms. Diamond in the same manner and format as the first bill.

On July 8, 2013, the firm sent an email addressed to Amy and Ari seeking payment. In that email, the plaintiff states, "[i]n our last conversation you have confirmed that you will transfer our legal fees by the end of June, but that transfer has not been made. Therefore, I would kindly request you to do so soon as possible." On August 7, 2013, Ms. Diamond replied to this request and indicated, "[w]e have set terms with the new operator and are waiting on contracts which will begin parents. Apologies for the delay." This was the last communication from the defendant. On the contrary, Cassouto-Noff sent missives threatening litigation unless the payment was forthcoming.

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[5] Ms. Diamond used both the Bandel email (adiamond@bandelinterests.com) and her personal email (afd9119@yahoo.com) in communicating with counsel.

Finally, a year later, on July 2, 2014, the plaintiff sends a demand for payment to all defendants prior to litigation. In this demand, the firm indicated that "you had given your consent to pay the Fee on a number of occasions." Litigation was imminent.

On August 5, 2014, Cassouto-Noff sent an email to both Ari and Amy asserting the arbitration clause in the Fee Agreement and submitting the names of three potential arbitrators. This salvo was not acknowledged.

Litigation was commenced in Israel in December, 2014. The Israeli Magistrates Court, pursuant to a request from the plaintiff and in conformity with section 500 of the Israeli Rules of Civil Procedure, permitted the plaintiff to serve Amy Diamond with the Statement of Claim "outside the jurisdiction according to the respondents' address as it appears in the statement of claim." The Court allowed service by way of registered air mail or personal service through an international courier company. The original documents must be accompanied by a certified English translation.

In April 2015, the plaintiff, through the use of a Berkshire County Deputy Sheriff, attempted service on Ms. Diamond regarding the claim. As noted in the return, the Deputy Sheriff made multiple attempts to serve Ms. Diamond without success. On four occasions the Deputy Sheriff went to the residence at 720 West Road, Richmond, on two occasions he spoke with the defendant's husband at the home and on one occasion he spoke, over the telephone, with the defendant and was advised that "she would not arrange to accept the service and was told by her attorney that she did not have to." For reasons that are not clear the documents were not left at the residence.

Ms. Diamond, a resident at all pertinent times at 720 West Road, Richmond, has never owned property in Israel and has not been back to Israel since the litigation. She was aware of the litigation that was commenced in Israel against her, but does remember when she first became aware of this event. In fact, she reviewed the Israeli court documents but, again, does not know when this took place. She took no action to respond to the lawsuit or vacate the Israel judgment.

The information regarding service was conveyed to the Israeli Court and the Final Judgment reflect the following, "it was proven to me by the Applicant that Ms. Amy diamond refuses to receive the relevant documents with lack of Bona fide in the intent of evading the law…" The final judgment was entered on October 3, 2015.

As a post script, Ms. Diamond and the Bandel Group was unable to secure investors or another operator that was acceptable to the Israeli government. Bandel East Med, LLC was placed into bankruptcy in Houston, Texas, and ultimately discharged. The financial debt to Cassuto-Noff was one of the unsecured obligations adjudicated in the bankruptcy.

It should also be noted that the Bandel Group had secured other legal representation in Israel prior to the "Option" litigation. Mietar's representation resulted in legal fees owed in the amount of $60,016. In addition, the Holender Law firm from Tel

Aviv, also provided legal representation incurring $25,592.00 in fees. The American law firm, Greenberg-Trourig, also provided substantial legal services to the Bandel Group, both in the United States (Attorney David M. Schwartzbaum) and Tel Aviv, Israel (Attorney Joey Shabot), billing out $1,500,365.00 in fees. Finally, Ernst & Young, in Tel Aviv, billed accounting fees in the amount of $8,000.00.[6] All of these fees were discharged in the Texas bankruptcy.

DISCUSSION

The plaintiff is seeking to enforce its Israeli judgment against the defendant, Amy Diamond, in the Commonwealth. The recognition of foreign money judgments in Massachusetts is governed by G.L. c. 235 § 23A, "Uniform Foreign Money-Judgment Recognition Act" (the Act). When a Massachusetts court grants recognition under the Act to a foreign judgment, the judgment is immediately enforceable as though it were a final judgment of a Massachusetts court. The statute confer on judgments of foreign countries the same status as judgment of sister states, and grant those foreign judgments full faith and credit.

The Act "applies to any out-of-country foreign judgment that is final and conclusive and enforceable where rendered." § 23A. A judgment is conclusive between the parties to the extent that it grants or denies a sum of money. Although such judgments are prima facie enforceable, the Act provides ten grounds for which a foreign judgment may be denied recognition. Here, the defendant alleges that the Israeli judgment should not be recognized due to three defenses recognized under the statute; (1) lack of personal jurisdiction, (2) *Forum Non Conveniens* and (3) the foreign judgment is repugnant to the public policy of the Commonwealth as it makes the defendant personally responsible for the debts of a corporation.

I. Personal Jurisdiction

The first defense raised by the defendant is that the Israeli court lack personal jurisdiction to adjudicate the claim against her. The Act specifically identifies lack of personal jurisdiction as a grounds for non-enforcement of the foreign judgment. See G.L. c. 235 § 23A.

As a preliminary matter, this court must determine the proper law to be considered in analyzing personal jurisdiction under the Act. The Act does not specify which country's law is to be applied when examining whether the exercise of personal jurisdiction is proper in response to an objection to recognition. The Supreme Judicial Court has not addressed this issue and there is a split of authority among the various states. See *Evans Cabinet Corp. v. Kitchen Intern., Inc.*, 593 F.3d 135, 138 (1st Cir. 2010).

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[6]This information was provided in the Bankruptcy Petition filed in Houston on behalf of Bandel East Med LLC. The only debts listed by the Debtor was to these law firms and Cassouto-Noff. Ms. Diamond was identified as the Managing Member.

In many jurisdictions that have enacted similar recognition acts, courts have engaged in a two-part analysis: first, applying the foreign law to determine whether the foreign court had jurisdiction; and second, applying a U.S. Constitutional Due Process "minimum contacts" analysis and ensuring that the exercise of jurisdiction complies with the "traditional notions of fair play and substantial justice." See, e.g., *Monks Own, Ltd. V. Monastery of Christ in the Desert*, 142 N.M. 549, 168 P.3d 121, 124-27 (2007). However, a few courts have applied only the law of the recognizing forum. *Evans Cabinet Corp. v. Kitchen Intern., Inc.*, 593 F.3d at 142 n. 10 (recognizing that some courts have applied only the law of the recognizing forum in determining personal jurisdiction).

I will adopt the two-part test and hold that in assessing whether the exercise of personal jurisdiction is proper under the Act, I must determine whether the exercise is proper under both the law of the foreign jurisdiction (Israel), as well as under U.S. Constitutional due process requirements. This approach allows the defendant to challenge recognition on grounds that the foreign forum, under its own law, lacked personal jurisdiction over the defendant, similar to the approach taken by Massachusetts courts when enforcing a domestic foreign judgment. The second step ensures that the finding of jurisdiction comports with U.S. Constitutional due process requirements.

Here, the plaintiff presented evidence that the Israeli default judgment was final and conclusive, the burden shifted to the defendant to prove that the Israeli court lacked personal jurisdiction over the defendant under Israeli law. However, the defendant does not argue that personal jurisdiction did not exist under the laws of Israel. Therefore, that issue is not before this court.

A. Personal Jurisdiction over Corporate Official

It is undisputed that Israel had personal jurisdiction over the Bandel Group. However, Ms. Diamond is asserting that exercising jurisdiction over her personally would be improper since she was merely acting in the scope of her employment as a Managing Partner of the various business entities that comprise the Bandel Group. It is axiomatic that jurisdiction over a corporation "does not automatically secure jurisdiction over its officers." *Morris v. Unum Life Ins. Co. of Am.*, 66 Mass. App. Ct. 716, 720 (2006). See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984) ("Jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him[.]").

On the other hand, "status as [an] employee does not somehow insulate [that individual] from jurisdiction. Each defendant's contacts with the forum State must be assessed individually." *Calder v. Jones*, 465 U.S. 783, 790 (1984). The question of personal jurisdiction over an individual, therefore, rests on whether there is an independent basis for jurisdiction based on an individual's actions and the nature and extent of her individual contacts with Israel, regardless of the capacity in which those actions were taken. *Rissman Hendricks & Oliverio, LLP v. MIV Therapeutics Inc.*, 901 F. Supp. 2d 255, 264 (D.Mass. 2012).

The defendant nevertheless contends that the Israeli court cannot exercise personal jurisdiction over her because any actions that would otherwise confer personal jurisdiction were undertaken solely in her role as a Managing Partner of a business entity. This argument is commonly referred to as the "fiduciary shield" doctrine, which "holds that acts performed by a person in her capacity as a corporate fiduciary may not form the predicate for the exercise of jurisdiction over [her] in [her] individual capacity." *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 573 F. Supp. 1106, 1111 (D.Mass.1983). The doctrine is not constitutionally based, but rather is a judicially created equitable principle based on "judicial inference as to the intended scope of state long-arm statutes." *Johnson Creative Arts*, 573 F. Supp. At 1111.

No Massachusetts court has adopted the fiduciary shield doctrine, and courts in the First Circuit do not recognize the doctrine as a limitation on the Massachusetts long-arm statute. See *Morris v. UNUM Life Ins. Co. of America*, 66 Mass. App. Ct. 716, 720 n. 7 (2006); *Haddad v. Taylor*, 32 Mass. App. Ct. 332, 335–37 (1992). Consequently, I decline to adopt this doctrine. However, "to establish jurisdiction over a nonresident corporate officer, there must be an independent basis for requiring the officer to defend in a foreign court. This requirement is satisfied when the officer herself transacts business within the foreign state, whether or not the business is personal or solely on behalf of the corporation." *Yankee Group, Inc., v. Yamashita*, 678 F. Supp. 20, 23 (D.Mass. 1988).

As stated above, Ms. Diamond traveled to Israel to further Bandel's business interests. Her trips included meetings with the attorneys, bankruptcy trustees and related parties. She engaged in court proceedings by providing an affidavit and appeared in court to observe the proceedings. Ms. Diamond negotiated a favorable settlement that was ultimately approved by the Israeli court. She also communicated with counsel in Israel throughout the litigation. Simply stated, less activity has been found to constitute the "transaction of business" and therefore affirm personal jurisdiction under Massachusetts long-arm statute. See, e.g., *Yankee Group, Inc., v. Yamashita*, 678 F. Supp. 20, 23 (D.Mass. 1988) (visiting Massachusetts two or three times a year to conduct business, telephoning and writing plaintiffs in Massachusetts constitutes transaction of business); *Carlson Corp. v. University of Vermont*, 380 Mass. 102, 105 (1980) (single visit to sign contract at issue sufficient to constitute transaction of business); *Good Hope Indus., Inc.*, 378 Mass. at 379 (telephone calls, mailings and accepting payment by checks drawn from Massachusetts bank account held to constitute transaction of business); *Haddad*, 32 Mass. App. Ct. at 335 (use of telephone and mails constitute transaction of business).

Massachusetts courts have also asserted personal jurisdiction over corporate officers "when the conduct giving rise to the litigation is entrepreneurial or managerial in nature." *Kleinerman v. Morse*, 26 Mass. App. Ct. 819, 824 (1989)("active entrepreneurial or managerial conduct in the State where jurisdiction is asserted will cause jurisdiction to attach").[7] See *Johnson Creative Arts, Inc. v. Wool Masters, Inc.* 573 F. Supp. at 1111 (D.

[7] In *Kleinerman*, a motion to dismiss for lack of personal jurisdiction by the president of a company who personally engaged in many activities in Massachusetts was properly denied because it was "premature at the outset to assume that [he] was at all times acting in the capacity of an agent." *Id.* at 825. However,

Mass. 1983) (court considered conduct of president in planning incorporation, soliciting business, and receiving telephone orders from Massachusetts retailers in jurisdictional analysis); *Gleason v. Jansen*, 76 Mass. App. Ct. 1128 (2010).

The activities of Ms. Diamond in searching for natural gas in the Mediterranean was the paradigm of an entrepreneurial venture. Undaunted, she forged ahead in a business venture that is littered with failure (80%), incredibly high costs and with business entities that had no assets, no direct experience and in an region of the world that would cause Magellan to pause. If successful, the profits would be in the millions. Given the common understanding of entrepreneurial, Ms. Diamond's starting and managing this business and taking considerable financial risks in the hopes of making a substantial profit, fits that description.

Finally, as I found, Ms. Diamond agreed to be responsible for the legal fees and this was done outside of her employment with the Bandel Group. Her agreement to guarantee the legal payment was a binding contract and would also subjected her to Israeli jurisdiction.

There is one final step regarding personal jurisdiction. A court may exercise jurisdiction over a non-resident defendant only if the exercise of jurisdiction is consistent with the due process clause of the 14th Amendment such that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Wash. Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945). The exercise of personal jurisdiction over a nonresident defendant satisfies due process if "the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

The plaintiff must demonstrate; (1) the defendant's purposeful availment of commercial activity in Israel, (2) the relation of the claim to the defendant's contacts in Israel, and (3) and the comportment of the exercise of jurisdiction with "traditional notions of fair play and substantial justice." *Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth*, 457 Mass. 210, 217 (2010).

***1.* Purposeful Availment.**

The "purposeful availment" test turns on the voluntariness of the contact and the foreseeability of the present action. See *Calder v. Jones*, 465 U.S. 783 (1984). When the defendant "deliberately creates 'continuing obligations' between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there" and it is therefore "not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Burger King Corp. v. Rudzewicz*, 471 U.S. at 475–476. In assessing purposeful availment, the "focus is on whether a defendant has "engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction

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lower level officers with more limited activities in Massachusetts were found not to have availed themselves purposefully of the privilege of conducting business in the forum and were dismissed.

fair, just, or reasonable." *Rush v. Savchuk*, 444 U.S. 320, 329 (1980). The court looks to the voluntariness of the defendant's contacts with the forum and the foreseeability that she would be subject to a lawsuit there. The "'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts...." *Burger King Corp. supra* at 475.

Conducting an ongoing business relationship with an Israeli business to derive commercial benefit from it, constitutes purposeful availment. See *Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth*, 457 Mass. at 217–18 (soliciting business from Mass. resident was purposeful availment). Where a defendant deliberately creates continuing obligations between herself and a resident of Israel, she has availed herself of the privilege of conducting business there. *Diamond Group, Inc. v. Selective Distrib. Int'l, Inc.*, 84 Mass. App. Ct. 545, 553 (2013). In addition, the fact that the Agreement contains a choice of law provision favoring Israel makes it foreseeable that the plaintiff would sue for any breach of contract in an Israeli court. See *M–R Logistics, LLC v. Riverside Rail, LLC*, 537 F.Sup.2d 269, 278 (D.Mass. 2008).

In other words, the defendant was not "haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts...." *Burger King Corp. supra* at 475. Ms. Diamond deliberately sought out Cassouto-Noff for legal services and then continued to communicate and engage with them over the course of the representation. She entered into a Fee Agreement with the plaintiff on behalf of the Bandel entities. Ms. Diamond traveled to Israel to participate in negotiations with the Bankruptcy Trustees and assist the lawyers regarding the litigation in an Israeli court.

The purposeful availment prong is satisfied. See *Good Hope Indus. V. Ryder Scott Co.*, 378 Mass. at 11 (finding purposeful availment where defendant sent appraisal reports and initiated numerous telephone calls to the plaintiffs at their headquarters in Massachusetts). What is significant "is that the defendant's contacts with the forum were deliberate and not fortuitous, such that the possible need to invoke the benefits and protections of the forum's laws was reasonably foreseeable, if not foreseen, rather than a surprise." *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 496 (5th Cir.1974).

2. Relatedness

The "relatedness" inquiry focuses on whether the current action arises out of the course of conduct committed by the defendant. This is similar to the "arises from" requirement of the Long–Arm statute. See *Diamond Grp.* 84 Mass. App. Ct. at 554. In interpreting the Long–Arm statute's "arising from" clause, courts have applied a "but for test;" i.e. but for the defendant's course of conduct, the plaintiff's injury would not have occurred. See *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 770 (1994). Applying this test to the facts of this case, I find that but for Ms. Diamond's purposeful solicitation of Cassuto-Noff's legal services in Israel and her continuous contact after that, Cassouto-Noff would not have suffered its alleged damages, the non-payment under the Fee Agreement.

Moreover, Cassouto-Noff's claim is for breach of contract. The Supreme Court has held that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with [the forum] State." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957). See also *Burger King*, 471 U.S. at 478–479 (for purpose of minimum contacts analysis in contract cases, "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing" are factors be considered).

All of the work requested by Ms. Diamond under the Fee Agreement was performed in Israel, These facts are sufficient to establish that the contract between *Cassouto-Noff* and the Bandel Group, as negotiated by Ms. Diamond, had a "substantial connection" with Israel. Accordingly, plaintiff has satisfied the relatedness requirement of due process.

3. Fair Play and Substantial Justice

Third and finally, in determining whether exercising personal jurisdiction in the present case comports with "fair play and substantial justice," the court must "weigh Israel's interest in adjudicating the dispute, the burden on Ms. Diamond of litigating in Israel, and Israel's interest in obtaining convenient and effective relief." *Bulldog Investors*, 457 Mass. at 218, citing *Burger King* 471 U.S. at 476–77. In assessing these factors, deference should be accorded to the plaintiff's choice of forum. See *Clark v. City of St. Augustine*, 977 F. Supp. 541, 545 (1997); *Noonan v. Colour Library Books*, 947 F. Supp. 564, 569 (1996).

Here, the defendant sought out the expertise of the plaintiff; communicated on numerous occasions with counsel; and was, or should have been aware, that all of the plaintiff's work would be performed in Israel. Additionally, the plaintiff's cause of action arises out of that legal representation. It was not unexpected that if a dispute developed between the parties, suit would be instituted in Israel.

It is always inconvenient and costly for a party to litigate in a foreign jurisdiction; accordingly, the defendant must show that the exercise of jurisdiction by the forum is onerous in a special, unusual, or other constitutionally significant way. *C.W. Downer & Co. v. Bioriginal Food & Science Corp.*, 771 F.3d 59, 69–70 (1st Cir. 2014). The defendant has not demonstrated that litigation-related travel between Massachusetts and the Israel poses a special or unusual burden in the modern age or that the international dimensions of this case present some other unique onus. See *Nowak v. Tak How Investments Ltd.*, 94 F.3d 708, 718 (1st Cir. 1996)(not unduly burdensome to make company with sole place of business in Hong Kong defend suit in Massachusetts). Given that Ms. Diamond traveled to Israel to assist in validating the "Option" claims in court, it should be no more onerous to participate in this litigation in Israel.

Moreover, there is no evidence that Cassouto-Noff has chosen to adjudicate this matter in Israel merely to harass or vex the defendant. See *Gemini Investors, Inc. v. Ameripark, Inc.*, 542 F.Sup.2d 119, 125 (D. Mass.2008). Accordingly, any burden on Ms.

Diamond in litigating this dispute in Israel falls short of attaining constitutional significance. As an Israeli business, Cassouto-Noff is entitled to accessible legal process in Israel for the assertion of its contract claim. See *Diamond Group, Inc. v. Selective Distribution Int'l, Inc.*, 84 Mass. App. Ct. at 554; *Jet Wine & Spirits, Inc. v. Bacardi & Co.*, 298 F.3d 1, 11 (1st Cir.2002). Correspondingly, the State of Israel has a manifest interest in providing a convenient forum to its citizen and residents asserting good faith and objectively reasonable claims for relief. *Bulldog Investors Gen. Partnership*, supra at 218 (Commonwealth has a manifest interest in providing a convenient forum to residents asserting good faith and objectively reasonable claims for relief). Israel has a strong interest in ensuring that those who purposefully transact business in Israel comply with its laws.

Moreover, there is no allegation that any witness reside in Massachusetts or that any evidence regarding the underlying contract dispute is located in the Commonwealth. See *Mueller Sys., LLC v. Robert Teti and Itet Corp.*, 199 F. Supp. 3d 270, 279 (D. Mass. 2016) (holding that adjudicating in forum state would not provide effective relief when necessary evidence and witnesses were located outside of the forum).

Weighing the relevant factors, first, Israel clearly has an interest in adjudicating the dispute because of its legitimate desire to protect its citizens by affording them a forum for the enforcement of their claims against nonresidents. Second, the mere inconvenience that may be caused to the defendant does not outweigh Israeli interests in the case being litigated where the contract was entered into. *Bulldog Investors*, 457 Mass. at 218. Ms. Diamond has failed to articulate any "special or unusual burden" that she may suffer as a result of the Israeli Court's exercise of personal jurisdiction over her. Third, given that the choice of law clause would dictate that the substantive dispute be governed by Israeli law, having an Israeli court as the forum is likely to bring about a more convenient and effective resolution of the case than if the case was resolved elsewhere, particularly in Massachusetts. Coupled with the fact that deference should be given to plaintiff's choice of forum, this court is satisfied that Israel had personal jurisdiction over the defendant in this case.

Accordingly, the exercise of personal jurisdiction over the defendant does not appear to be fundamentally unfair. Simply stated, the exercise of jurisdiction over Ms. Diamond in Israel did not "offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

II. *Forum Non Conveniens*

As noted in the recent case of *Oxford Global Resources, LLC v. Hernandez*, 480 Mass. 462, 468 (2018),

> "the well-established common-law doctrine of *forum non conveniens* provides that, 'where in a broad sense the ends of justice strongly indicate that the controversy may be more suitably tried elsewhere, then jurisdiction should be declined and the parties relegated to relief to be sought in another forum.'

> *Gianocostas v. Interface Group Mass, Inc.*, 450 Mass. 715, 723 (2008), quoting *Universal Adjustment Corp. v. Midland Bank, Ltd.*, 281 Mass. 303, 313 (1933). The statutory formulation of *forum non conveniens* mirrors the common-law doctrine and provides that, '[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just.' G. L. c. 223A, § 5."

The doctrine of *forum non conveniens* allows a court to dismiss a suit if there are strong reasons for believing it should be litigated in the courts of another, normally a foreign, jurisdiction. *W.R. Grace & Co. v. Hartford Accident & Indem. Co.*, 407 Mass. 572, 577 (1990). The decision to dismiss on the basis of *forum non conveniens* is left to the discretion of the Court, and is appropriate "when an adequate available forum exists and trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience, or the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Co.*, 549 U.S. 422, 429 (2007). Where jurisdiction and venue are proper, dismissal on the ground of *forum non conveniens* rarely will be granted. *Gianocostas v. Interface Group Mass, Inc.*, 450 Mass. at 723.

Courts take a two-step approach in analyzing a motion to dismiss grounded on *forum non conveniens*: first, an assessment of whether an adequate alternative forum exists, and second, an "assessment of a range of considerations, most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality." *Sinochem* 549 U.S. at 429 (2007).

The defendant bears the burden of showing that the law of the alternate forum (Massachusetts) permits recovery for the plaintiff under the circumstances presented. *Gianocostas v. Interface Group Mass., Inc.*, 450 Mass. at 725. If the court determines that an adequate alternative forum exists, it then must weigh the relevant private and public considerations. *Id.* Relevant private factors are the ease of access to proof, the availability of compulsory process, the cost of the attendance of witnesses, and the enforceability of a judgment. *W.R. Grace & Co. v. Hartford Accident & Indem. Co.*, 407 Mass. at 578. Relevant public interest factors are the administrative burdens caused by litigation that has its origins elsewhere, the local interest in having localized controversies decided at home, and the desirability of trying a case in a forum that is familiar with the governing law. *Id.* at 578. Unless the balance weighs strongly in favor of the defendant, the plaintiff's choice of forum should not be disturbed. *Id.* 583-584 (substantial and compelling reasons to try case elsewhere may overcome plaintiff's choice of forum).

As a first step, it must be determined whether an alternative forum is available? The defendant asserts that Massachusetts is an appropriate available forum. "An alternative forum is adequate when the parties will not be deprived of all remedies or treated unfairly." *Gianocostas*, 450 Mass. at 723.

I am confident that Massachusetts would treat the parties equally and fairly and that adequate remedies would be available to the plaintiff. Accordingly, I finds that Massachusetts courts would be an adequate alternative forum for this lawsuit.

The second step in the analysis is to balance a number of public and private interest factors. The relevant private interests weigh heavily in favor of litigating this case in Israel. Everything relevant to this case and every significant event concerning the transaction took place in Israel. The plaintiff and the subject-matter of the contract were located in Israel and that the agreement at issue was negotiated and executed in Israel as well. It appears that all relevant witnesses are located in Israel. All other relevant evidence is located in Israel. Additionally, payment and performance under the contract were to be completed in Israel. Any breach of the agreement must have taken place in Israel. Given the relative ease of access to sources of proof and the cost of obtaining attendance of the witnesses, Israel is the most appropriate forum.

Ms. Diamond asserts that the travel to Israel and its costs would be prohibitively expensive. Given that Ms. Diamond already spent time, voluntarily, in Israel to advocate for the options, and given the relative convenience of air travel, it is not inappropriate to require her to appear and defend the case in Israel.

With respect to the relevant public interests, Israel has a much stronger interest than Massachusetts in deciding this dispute. This litigation will be decided by Israel law and the public's interest in having the trial in a forum that is at home with the law that must govern the action strongly supports the resolution of this dispute in Israel. Massachusetts, conversely, has very little interest in the outcome of this lawsuit. In addition, litigating this case in Massachusetts, and the need to locate, interpret, and apply Israeli law is a substantial inconvenience to the court. See Joly *v. Albert Larocque Lumber Ltd.*, 397 Mass. 43, 44-45 (1986). In *Joly*, the SJC dismissed a case filed in Massachusetts concluding that Canada was a more appropriate forum, in that all parties, most witnesses and the pertinent documents are residents or located in Canada. Moreover, the negligence occurred in Canada and Canadian law would apply.

I conclude that the defendant has not met her burden of proving that the balance of concerns are "strongly in favor" of forcing plaintiff to litigate this case somewhere other than the venue of its choice, and that it would therefore be inappropriate to dismiss this action under the doctrine of *forum non conveniens*. See *Walton v. Harris*, 38 Mass. App. Ct. 252, 257-58 (1995) (reversing dismissal of action on *forum non conveniens* grounds as abuse of discretion).

III. Notice of the Israeli Proceedings

The defendant has also raised the issue of whether the defendant was given adequate notice of the Israeli lawsuit. As outlined above, the plaintiff failed to provide the defendant notice of the Israeli lawsuit by in-hand service, or by delivery at last and usual address or by certified mail. Instead there was a number of attempts to serve Ms.

Diamond in-hand that failed. The defendant claims that this failure to properly serve Ms. Diamond as required by Massachusetts law is fatal to the claim.

The Uniform Foreign Money–Judgments Recognition Act specifically enumerates the instances in which a foreign judgment should not be recognized and includes two provisions that should be considered:

> "A foreign judgment shall not be recognized if (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend; …(3) the cause of action on which the judgment is based is repugnant to the public policy of this state; …."
>
> G.L. c. 235, § 23A.

The defendant has bypassed the requirements under the Act and in particular defenses related to subpart (1) regarding "notice of the proceedings" and subpart (3) "public policy" violations and, instead, argues that there was ineffective service of process as required by Mass. R. Civ. Pro. 4. She cites the case of *Wang v. Niakaros*, 67 Mass. App. Ct. 166 (2006) for support.[8]

In the *Wang* case, the plaintiff served an initial complaint, but failed to serve a copy of his amended complaint, with new claims, on the defendant, who had been in default for failing to appear. The Appeals Court reversed the trial court's denial of the defendant's motion for relief from judgment, ruling that the plaintiff had failed to comply with Rule 4(a). There were indications in *Wang*, however, that the defendant was aware of the plaintiff's amended complaint, even though he was not properly served in the manner prescribed by Rule 4. Although this information was not presented to the trial court in appropriate form, the Appeals Court found that if the plaintiff could prove that the defendant or his attorney knew of the amended complaint and engaged in a pattern of delay and evasion, that conduct might excuse the plaintiff from specific compliance with Rule 4. At the same time, the Appeals Court noted that "in the absence of material and admissible evidence, the **due process** requirements of adequate notice and opportunity to appear cannot be deemed to have been satisfied without adherence to rule 4." *Id* at 171 (emphasis added).

The first question is whether the Act requires service of process of the Israeli civil complaint consistent with Rule 4? If not, what does the Act require to effectuate proper notice?

Initially, there is nothing in the Act that requires formal service of process, particularly pursuant to Rule 4.[9] Instead, the Act requires that the defendant "receive

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[8] In a sense, the defendant appears to be approaching this issue as an appeal of the Israeli judgment under the general laws of the Commonwealth, as opposed to the specific requirements of G.L. c. 235, § 23A.

[9] "Service of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988).

notice of the proceedings in sufficient time to enable him to defend." I do not equate this requirement with compliance with Rule 4 and the defendant does not cite any supporting authority for such a proposition. See *Ackermann v. Levine*, 788 F.2d 830, 843 (2d Cir. 1986)("To construe the Act otherwise would unduly burden foreign judgment holders with the procedural intricacies of all fifty states and the federal government."). As stated in *McCord v. Jet Spray Int'l Corp*., 874 F. Supp. 436, 437 n.1 (D. Mass 1994), "[c]ommentators have also questioned the use of state law in determining the preclusive effect of a foreign judgment. See 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4473 (1981 & Supp.1994) ('it is intrinsically awkward to confront foreign judgments with the potentially divergent law of fifty states and federal courts')."

Further I do not believe that a violation of Rule 4 triggers the public policy exception. The public policy exception operates only in those unusual cases where the foreign judgment is "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought." *Ackermann v. Levine*, 788 F.2d 830, 843 & n. 13 (2d Cir.1986)("it is not enough merely that a foreign judgment fails to fulfill domestic practice or policy"). Under the "classic formulation" of the public policy exception, a judgment is contrary to the public policy of the enforcing state where that judgment " 'tends clearly' to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property." *Ackermann*, 788 F.2d at 841, quoting *Somportex v. Philadelphia Chewing Gum*, 453 F.2d 435, 443 (3d Cir.1971). See *McCord*, 874 F. Supp. at 439–440 (Belgian judgment in conflict with Massachusetts' policy of "at-will" employment contracts does not violated public policy).

I believe that it would be unrealistic to find failure to follow the Massachusetts Rules of Civil Procedure by a foreign nation to be *ipso facto* a violation of American public policy. It would be unworkable for the United States to require all foreign judicial systems to adhere to the rules of civil procedure of each state. Obviously, all foreign judgments will be inconsistent to some extent with the various rules; in fact, many state court judgments are inconsistent with each other, for that matter. A much more important discrepancy than this is necessary to create a violation of public policy. I do not find the Israeli court's decision on notice to be so "repugnant to fundamental notions of what is decent and just" that American public policy requires non-enforcement of the subsequent judgment.

Returning to the *Wang* case, the Appeals Court specifically notes that notice must comply with due process and that Rule 4 is simply a mechanism to insure that it does. I disagree with the defendant that the *Wang* case requires that Rule 4 service of process be required in all cases, particularly involving G.L. c. 235, § 23A. However, any notice must be consistent with due process.

Accordingly, I am not inclined to superimpose the requirement of Rule 4 on this notice requirement.[10] The thrust of the Act is to provide appropriate notice to the defendant; it does not require that such notice be conducted in any particular way. Accordingly, if the notice is sufficient under Israeli law, the plaintiff must establish that it comports with "due process."

The Israeli court found that the notice was adequate given the defendant's attempt to avoid service and the defendant does not argue otherwise. As with the personal jurisdiction issue, I must now consider whether the notice complied with due process. The United States Supreme Court has considered the question of sufficiency of notice on many occasions. "It has uniformly held that the adequacy of notice so far as due process is concerned, is dependent on whether the form of notice provided is 'reasonably calculated to give . . . actual notice of the proceedings and an opportunity to be heard.' *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)."

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); see also *Lidas, Inc. v. United States*, 238 F.3d 1076, 1084 (9th Cir.2001) ("Due process merely requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action."). "[W]hether a particular method of notice is reasonable depends on the particular [factual] circumstances." *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988).

Correspondingly in Massachusetts, "[t]he fundamental requisite of due process is an opportunity to be heard at a meaningful time and in a meaningful manner." *Matter of Kenney*, 399 Mass. 431, 435 (1987). The SJC noted that "'[n]otice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop.'" *Commonwealth v. Olivo*, 369 Mass. 62, 69 (1975), quoting *Essex National Bank v. Hurley*, 16 F.2d 427, 428 (1st Cir.1926). See *Commonwealth v. Welch*, 58 Mass. App. Ct. 408, 410 (2003)(actual notice of a 209A order).

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[10] If formal service of process is required under the Act, the potential candidates include formal service pursuant to the Massachusetts Rules of Civil Procedure (Rule 4), the Federal Rules of Civil Procedure (Rule 4(f)(1)) or the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Convention"). The Convention provides for several basic procedures for service. Service may be effected through: (1) a member state's Central Authority pursuant to Article 5 of the Convention; (2) consular channels designated by the member state pursuant to Article 9; or (3) service by mail pursuant to Article 10(a). See *Trump Taj Mahal Assocs. v. Hotel Servs., Inc.*, 183 F.R.D. 173, 176 (D.N.J. 1998). As a ratified treaty (both in the United States and Israel), the Convention is "the supreme law of the land." See U.S. Const. Art. VI, cl. 2. See *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir.1985).

At issue in *Olivo* were official notices to vacate unsafe housing written in English and personally served on Spanish-speaking individuals who could not understand English. *Olivo,* 369 Mass. at 69. Finding that this service constituted actual notice of the proceedings, the court held that it was "sufficient to put a reasonable person on notice that the order was important and, if not understood, required translation." *Id.* at 70. Thus, when served with an official notice in English, the tenants, who were under no impairment other than their inability to understand English, were there charged with the duty of further inquiry. Due process is satisfied if notice of the action was given in a manner reasonably calculated to reach it. *Id. at* 68.

In the case at bar, Ms. Diamond was aware that Cassouto-Noff held her personally responsible and was pressing her for payment of the legal fees. As time went on the urgency of the demand for payment was increasing. At no time did she deflect the demand to the corporate entities or profess no responsibility to pay the fees. Threats of litigation by Cassouto-Noff were ignored. Finally, email notice of the first step of legal action against Ms. Diamond was conveyed to her; that being a demand of arbitration as required under the agreement.

When this failed to get a response, a claim was filed in Israel. Service of process by a sheriff was repeatedly attempted with three visits to Ms. Diamond's residence to no avail. Finally, Ms. Diamond informed the deputy sheriff that "she would not arrange to accept the service and was told by her attorney that she did not have to." Ms. Diamond is correct that she is under no obligation to accept service of process, however, that does not mean that she was not aware of the lawsuit and may "shut [her] eyes to the means of knowledge which [s]he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received." *Commonwealth v. Olivo*, supra, quoting *NLRB v. Local 3, Bloomingdale Dist. 65, Retail, Wholesale & Dep't Store Union*, 216 F.2d 285, 288 (2d Cir.1954).

Finally, Ms. Diamond testified that she was aware of the lawsuit, however, she did not know when she had this information. From all the evidence, I infer that she had knowledge of the lawsuit prior to the default judgment entering and was afforded the opportunity to be heard. Accordingly the due process requirements has been met.

IV. Public Policy: Employees Personally Liable for Corporate Debts

The defendant has also asserted that under the Act, a court may decline to enforce a foreign money judgment if "the cause of action on which the judgment is based is repugnant to the public policy of this state."

With respect to the argument that enforcement of this judgment would violate Massachusetts' policy against holding corporate officers personally liable for corporate debts, it should be pointed out that Israel also has a policy against lightly piercing the corporate form. As noted in the evidence presented, Israel has a comparable respect for the corporate form and the limits on liability on corporate employees. However, as I noted in Part IA infra, "status as [an] employee does not somehow insulate [that

individual] from jurisdiction. Each defendant's contacts with the forum State must be assessed individually." *Calder v. Jones*, 465 U.S. 783, 790 (1984).

There was considerable evidence presented that Ms. Diamond's activities in Israel on behalf of the business and her interests in the business would subject her to Israeli jurisdiction. The Israeli court did not ignore or refuse to consider corporate identity; this was one of the issues specifically raised in the pleadings. See Statement of Claim para. 25-27.

The Act does not require that the procedures of a foreign court be identical to those used in the courts of Massachusetts. *Ingersoll Milling Machine Co. v. Granger*, 833 F.2d 680, 687 (7th Cir.1987). What counts is not whether the procedures used are similar or dissimilar to ours, but "only the basic fairness of the foreign procedures." *Id.* at 688. The due process concept embodied in the Act requires a fair procedure "simple and basic enough to describe the judicial processes of civilized nations, our peers." *Society of Lloyd's v. Ashenden*, 233 F.3d 473, 477 (7th Cir.2000). The statute requires simply that the foreign procedure be "compatible with the requirements of due process of law," namely, that "the foreign procedures are 'fundamentally fair' and do not offend against 'basic fairness.' " *Id.* I find no basis for concluding that the procedures of the Israeli civil justice system fail to measure up to the Act's due process test.

Defendant's arguments against holding her, rather than her corporation, liable could have and should have been made in Israel. She cannot fail to contest the Israeli plaintiff and then declare that she would have won. I find that the Israeli court's decision to pierce the corporate veil is not "repugnant" under the facts of this case, particularly when it is borne in mind that defendant did not present a case at all. See *Ackermann v. Levine*, 788 F.2d 830, 838-39 (2d Cir. 1986)

ORDER

In consideration of the above findings, judgment is entered as follows with respect to the claims tried jury-waived:

IT IS HEREBY ORDERED:

1. That judgment enter for the plaintiff, Cassouto-Noff & Co, in an amount of damages to be determined by either agreement of the parties or, if not agreed, the plaintiff shall submit his calculations of fees owned within two weeks of the date of this decision. The defendant shall submit a response, if any, two weeks after receiving plaintiff's argument..

2. Although the plaintiff' has requested attorney's fees, I am not aware of any authority that would permit such a recovery given that this proceeding is simply an enforcement of a foreign judgment. Damages, including attorney's fees, outside the foreign judgment is not permitted.

3. The plaintiff is also entitled to its court costs and interest pursuant to Massachusetts law.

SO ORDERED

Dated: February 19th, 2019

John A. Agostini
Associate Justice, Superior Court

THE COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE S.S. SUPERIOR COURT
ENTERED
FEB 19 2019
ENTERED

A true copy
Attest
Clerk

(25)

ADDENDUM

JUDGMENT ON FINDING OF THE COURT

Trial Court of Massachusetts
The Superior Court

Deborah S. Capeless, Clerk of Courts

DOCKET NUMBER
1676CV00050

CASE NAME
Cassouto-Noff & Co.
vs.
Amy Diamond

COURT NAME & ADDRESS
Berkshire County Superior Court
76 East Street
Pittsfield, MA 01201

JUDGMENT FOR THE FOLLOWING PARTY(S)
Cassouto-Noff & Co.

THE COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE S.S. SUPERIOR COURT
ENTERED
APR 19 2019
ENTERED

JUDGMENT AGAINST THE FOLLOWING PARTY(S)
Amy Diamond

This action came on before the Court, Hon. John A Agostini, presiding, and upon consideration thereof,

After Jury Waived Trial, it is **ORDERED AND ADJUDGED**:

That judgment enter as outlined below, Jointly & Severally with interest thereon as provided by law, and the statutory costs of action.

1. Date of Breach, Demand or Complaint	02/18/2016
2. Date Judgment Entered	04/19/2019
3. Number of Days of Prejudgment Interest *(line 2 - Line1)*	1156
4. Annual Interest Rate of 0.12/365.25 = Daily Interest rate	.000329
5. Single Damages	$334,621.00
6. Prejudgment Interest *(lines 3x4x5)*	$127,264.40
7. Double or Treble Damages Awarded by Court *(where authorized by law)*	$
8. Statutory Costs	$319.96
9. Attorney Fees Awarded by Court (where authorized by law)	$
10. **JUDGMENT TOTAL PAYABLE TO PLAINTIFF(S)** *(Lines 5+6+7+8+9)*	$462,205.36

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ~~ASST. CLERK~~
04/19/2019	X Deborah Stageum

A True Copy
Attest: Deborah Stageum
Clerk

Date/Time Printed: 04-19-2019 16:18:48

SJC/087: 09/2016

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE

SUPERIOR COURT
1676CV-00050

Cassouto-Noff & Co.
Plaintiff vs.

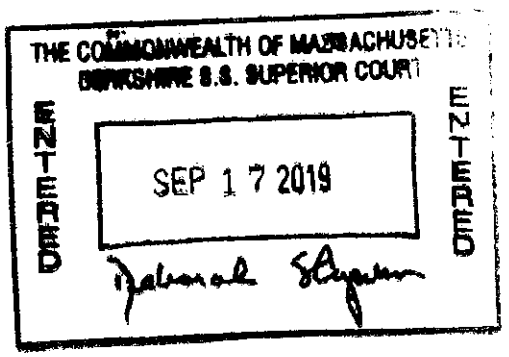
Amy Diamond
Defendant

CORRECTED **FINAL JUDGMENT**

After a jury-waived trial on October 25, 2018 and after issuance of Findings of Fact, Rulings of Law and Order after a Jury-Waved trial on February 19, 2019, it is hereby Ordered and Adjudged:

Plaintiff Cassouto-Noff & Co. shall recover from the Defendant Amy Diamond, at the Defendants' option, either (a) the amount of $334,621 INS (Israeli New Shekels) in Israeli Currency or (b) the equivalent of $334,621 INS in United States Dollars determined at the exchange rate in effect on the day of or the day before payment, with interest on that amount (in each instance), payable in Israeli Currency or United States Dollars, at 12% statutory interest from the date of entry of this civil action (which is February 18 2016) until the date of payment, plus Plaintiff's court costs as provided by law.

For form of Judgment see Union Camp Chemicals Ltd. v. State St. Bank & Tr. Co., 64 Mass. App. Ct. 1105, 832 N.E.2d 706 (2005) citing Manches & Co. v. Gilbey, 419 Mass. 414 (1995).



So Ordered:

John A. Agostini
Justice
Superior Court
2019

A True Copy
Attest:
Clerk

Part I ADMINISTRATION OF THE GOVERNMENT

ADDENDUM

Title XXII CORPORATIONS

Chapter 156C LIMITED LIABILITY COMPANY ACT

Section 22 DEBTS, OBLIGATIONS AND LIABILITIES OF LIMITED LIABILITY COMPANY

Section 22. Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member or manager of a limited liability company shall be personally liable, directly or indirectly, including, without limitation, by way of indemnification, contribution, assessment or otherwise, for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

ADDENDUM

Part III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

Title II ACTIONS AND PROCEEDINGS THEREIN

Chapter 235 JUDGMENT AND EXECUTION

Section 23A RECOGNITION AND ENFORCEMENT; DEFINITIONS

Section 23A. Except as hereinafter provided, any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal shall be conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment shall be enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.

A foreign judgment shall not be conclusive if (1) it was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (2) the foreign court did not have personal jurisdiction over the defendant; or (3) the foreign court did not have jurisdiction over the subject matter.

A foreign judgment shall not be recognized if (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend; (2) the judgment was obtained by fraud; (3) the cause of action on which the judgment is based is repugnant to the public policy of this state; (4) the judgment conflicts with another final and conclusive judgment; (5) the proceedings in the foreign court were contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action; or (7) judgments of this state are not recognized in the courts of the foreign state.

A foreign judgment shall not be refused recognition for lack of personal jurisdiction if (1) the defendant was served personally in the foreign state; (2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him; (3) the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved; (4) the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state; (5) the defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the

foreign state; or (6) the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising out of such operation.

The courts of this state may recognize other bases of jurisdiction.

If the defendant satisfies the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.

This section shall not prevent the recognition of a foreign judgment in situations not covered by this section and its provisions.

As used in this section (1) "foreign state" means any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands; (2) "foreign judgment" means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.

CHAPTER 502

An act to amend Section 11 of the Kings River Conservation District Act (Chapter 931, Statutes of 1951), relating to Kings River Conservation District.

[Approved by Governor June 30, 1967. Filed with Secretary of State June 30, 1967.]

The people of the State of California do enact as follows:

SECTION 1. Section 11 of the Kings River Conservation District Act (Chapter 931, Statutes of 1951) is amended to read:

Sec. 11. The board shall act only by ordinance, resolution or motion, and, except where action shall be taken by the unanimous vote of all directors present and voting, the ayes and noes taken upon the passage of all ordinances, resolutions and motions shall be entered upon the minutes of the board. No ordinance, resolution or motion shall be passed or become effective without the affirmative vote of at least a majority of the members of the board. The enacting clause of all ordinances passed by the board shall be in these words: "Be it ordained by the Board of Directors of Kings River Conservation District as follows:". All ordinances shall be signed by the president and attested by the secretary.

Each director shall receive the sum of thirty-five dollars ($35) for each meeting of the board attended by him, not exceeding five meetings in any calendar month, and such additional compensation as shall be fixed and allowed by the board for his services while otherwise employed by the authority of the board in the business of the district. He shall also be allowed, with the approval of the board, all traveling and other expenses reasonably incurred by him in such employment.

CHAPTER 503

An act to amend Section 1915 of, and to add Chapter 2 (commencing with Section 1713) to Title 11, Part 3 of, the Code of Civil Procedure, relating to the recognition of foreign money-judgments.

[Approved by Governor June 30, 1967. Filed with Secretary of State June 30, 1967.]

The people of the State of California do enact as follows:

SECTION 1. Chapter 2 (commencing with Section 1713) is added to Title 11, Part 3 of the Code of Civil Procedure, to read:

ADDENDUM

CHAPTER 2. FOREIGN MONEY-JUDGMENTS

1713. This chapter may be cited as the Uniform Foreign Money-Judgments Recognition Act.

1713.1. As used in this chapter:

(1) "Foreign state" means any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands;

(2) "Foreign judgment" means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.

1713.2. This chapter applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.

1713.3. Except as provided in Section 1713.4, a foreign judgment meeting the requirements of Section 1713.2 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.

1713.4. (a) A foreign judgment is not conclusive if

(1) The judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) The foreign court did not have personal jurisdiction over the defendant; or

(3) The foreign court did not have jurisdiction over the subject matter.

(b) A foreign judgment need not be recognized if

(1) The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

(2) The judgment was obtained by extrinsic fraud;

(3) The cause of action or defense on which the judgment is based is repugnant to the public policy of this state;

(4) The judgment conflicts with another final and conclusive judgment;

(5) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

(6) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

1713.5. (a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if

(1) The defendant was served personally in the foreign state;

(2) The defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;

(3) The defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;

(4) The defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;

(5) The defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; or

(6) The defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising out of such operation.

(b) The courts of this state may recognize other bases of jurisdiction.

1713.6. If the defendant satisfies the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.

1713.7. This chapter does not prevent the recognition or nonrecognition of a foreign judgment in situations not covered by this chapter.

1713.8. This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

SEC. 2. Section 1915 of the Code of Civil Procedure is amended to read:

1915. Except as provided in Chapter 2 (commencing with Section 1713) of Title 11 of Part 3 of this code, a final judgment of any other tribunal of a foreign country having jurisdiction, according to the laws of such country, to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state.

CHAPTER 504

An act to amend Section 1194.95 of the Insurance Code, relating to insurance.

[Approved by Governor June 30, 1967. Filed with Secretary of State June 30, 1967.]

The people of the State of California do enact as follows:

SECTION 1. Section 1194.95 of the Insurance Code is amended to read:

Massachusetts General Laws Annotated
Massachusetts Rules of Civil Procedure
II. Commencement of Action; Service of Process, Pleadings, Motions and Orders (Refs & Annos)

Massachusetts Rules of Civil Procedure (Mass.R.Civ.P.), Rule 4

Rule 4. Process

Currentness

(a) Summons: Issuance. Upon commencing the action the plaintiff or his attorney shall deliver a copy of the complaint and a summons for service to the sheriff, deputy sheriff, or special sheriff; any other person duly authorized by law; a person specifically appointed to serve them; or as otherwise provided in subdivision (c) of this rule. Upon request of the plaintiff separate or additional summons shall issue against any defendant. The summons may be procured in blank from the clerk, and shall be filled in by the plaintiff or the plaintiff's attorney in accordance with Rule 4(b).

(b) Same: Form. The summons shall bear the signature or facsimile signature of the clerk; be under the seal of the court; be in the name of the Commonwealth of Massachusetts; bear teste of the first justice of the court to which it shall be returnable who is not a party; contain the name of the court and the names of the parties; be directed to the defendant; state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend; and shall notify him that in case of his failure to do so judgment by default may be rendered against him for the relief demanded in the complaint.

(c) By Whom Served. Except as otherwise permitted by paragraph (h) of this rule, service of all process shall be made by a sheriff, by his deputy, or by a special sheriff; by any other person duly authorized by law; by some person specially appointed by the court for that purpose; or in the case of service of process outside the Commonwealth, by an individual permitted to make service of process under the law of this Commonwealth or under the law of the place in which the service is to be made, or who is designated by a court of this Commonwealth. A subpoena may be served as provided in Rule 45. Notwithstanding the provisions of this paragraph (c), wherever in these rules service is

permitted to be made by certified or registered mail, the mailing may be accomplished by the party or his attorney.

(d) Summons: Personal Service Within the Commonwealth. The summons and a copy of the complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual by delivering a copy of the summons and of the complaint to him personally; or by leaving copies thereof at his last and usual place of abode; or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by statute to receive service of process, provided that any further notice required by such statute be given. If the person authorized to serve process makes return that after diligent search he can find neither the defendant, nor defendant's last and usual abode, nor any agent upon whom service may be made in compliance with this subsection, the court may on application of the plaintiff issue an order of notice in the manner and form prescribed by law.

(2) Upon a domestic corporation (public or private), a foreign corporation subject to suit within the Commonwealth, or an unincorporated association subject to suit within the Commonwealth under a common name: by delivering a copy of the summons and of the complaint to an officer, to a managing or general agent, or to the person in charge of the business at the principal place of business thereof within the Commonwealth, if any; or by delivering such copies to any other agent authorized by appointment or by law to receive service of process, provided that any further notice required by law be given. If the person authorized to serve process makes return that after diligent search he can find no person upon whom service can be made, the court may on application of the plaintiff issue an order of notice in the manner and form prescribed by law.

(3) Upon the Commonwealth or any agency thereof by delivering a copy of the summons and of the complaint to the Boston office of the Attorney General of the Commonwealth, and, in the case of any agency, to its office or to its chairman or one of its members or its secretary or clerk. Service hereunder may be effected by mailing such copies to the Attorney General and to the agency by certified or registered mail.

(4) Upon a county, city, town or other political subdivision of the Commonwealth subject to suit, by delivering a copy of the summons and of the complaint to the treasurer

or the clerk thereof; or by leaving such copies at the office of the treasurer or the clerk thereof with the person then in charge thereof; or by mailing such copies to the treasurer or the clerk thereof by registered or certified mail.

(5) Upon an authority, board, committee, or similar entity, subject to suit under a common name, by delivering a copy of the summons and of the complaint to the chairman or other chief executive officer; or by leaving such copies at the office of the said entity with the person then in charge thereof; or by mailing such copies to such officer by registered or certified mail.

(6) In any action in which the validity of an order of an officer or agency of the Commonwealth is in any way brought into question, the party questioning the validity shall forthwith forward to the Attorney General of the Commonwealth by hand or by registered or certified mail a brief statement indicating the order questioned.

(e) Same: Personal Service Outside the Commonwealth. When any statute or law of the Commonwealth authorizes service of process outside the Commonwealth, the service shall be made by delivering a copy of the summons and of the complaint: (1) in any appropriate manner prescribed in subdivision (d) of this Rule; or (2) in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction; or (3) by any form of mail addressed to the person to be served and requiring a signed receipt; or (4) as directed by the appropriate foreign authority in response to a letter rogatory; or (5) as directed by order of the court.

(f) Return. The person serving the process shall make proof of service thereof in writing to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a sheriff, deputy sheriff, or special sheriff, he shall make affidavit thereof. Proof of service outside the Commonwealth may be made by affidavit of the individual who made the service or in the manner prescribed by the law of the Commonwealth, or the law of the place in which the service is made for proof of service in an action in any of its courts of general jurisdiction. When service is made by mail, proof of service shall include a receipt signed by the addressee or such other evidence of personal delivery to the addressee as may be satisfactory to the court. Failure to make proof of service does not affect the validity of the service.

(g) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process is issued.

(h) Certain Actions in Probate Courts: Service. Notwithstanding any other provision of these rules, in actions in the Probate Courts in the nature of petitions for instructions or for the allowance of accounts, service may be made in accordance with G.L. c. 215, § 46, in such manner and form as the court may order.

(i) Land Court. In actions brought in the Land Court, service shall be made by the court where so provided by statute.

(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 90 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Credits

Amended February 24, 1975, effective July 1, 1974; December 17, 1975, effective January 1, 1976; June 2, 1976, effective July 1, 1976; December 13, 1982, effective January 1, 1982; March 29, 1988, effective July 1, 1988.

Rules Civ. Proc., Rule 4, MA ST RCP Rule 4
Current with amendments received through 03/1/2020

End of Document

Massachusetts General Laws Annotated
Massachusetts Rules of Civil Procedure
VII. Judgment

Massachusetts Rules of Civil Procedure (Mass.R.Civ.P.), Rule 60

Rule 60. Relief From Judgment or Order

Currentness

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of review, of error, of audita querela, and petitions to vacate judgment are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

ADDENDUM

Rules Civ. Proc., Rule 60, MA ST RCP Rule 60
Current with amendments received through 03/1/2020

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title II. Commencing an Action; Service of Process, Pleadings, Motions, and Orders

Federal Rules of Civil Procedure Rule 4

Rule 4. Summons

Currentness

(a) Contents; Amendments.

(1) ***Contents.*** A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or--if unrepresented--of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal.

(2) ***Amendments.*** The court may permit a summons to be amended.

(b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons--or a copy of a summons that is addressed to multiple defendants--must be issued for each defendant to be served.

(c) Service.

(1) ***In General.*** A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) ***By Whom.*** Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) ***By a Marshal or Someone Specially Appointed.*** At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

(d) Waiving Service.

(1) ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, 2 copies of the waiver form appended to this Rule 4, and a prepaid means for returning the form;

(D) inform the defendant, using the form appended to this Rule 4, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent--or at least 60 days if sent to the defendant outside any judicial district of the United States--to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) ***Failure to Waive.*** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B)the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) ***Time to Answer After a Waiver.*** A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent--or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) ***Results of Filing a Waiver.*** When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) ***Jurisdiction and Venue Not Waived.*** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose

waiver has been filed--may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(g) Serving a Minor or an Incompetent Person. A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and--if the agent is one authorized by statute and the statute so requires--by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) ***United States.*** To serve the United States, a party must:

(A)(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought--or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk--or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) ***Agency; Corporation; Officer or Employee Sued in an Official Capacity.*** To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) ***Officer or Employee Sued Individually.*** To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) ***Extending Time.*** The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

(j) Serving a Foreign, State, or Local Government.

(1) ***Foreign State.*** A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

(2) ***State or Local Government.*** A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

(k) Territorial Limits of Effective Service.

(1) ***In General.*** Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

(2) ***Federal Claim Outside State-Court Jurisdiction.*** For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

(l) Proving Service.

(1) ***Affidavit Required.*** Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.

(2) ***Service Outside the United States.*** Service not within any judicial district of the United States must be proved as follows:

(A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

(B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(3) ***Validity of Service; Amending Proof.*** Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

(n) Asserting Jurisdiction over Property or Assets.

(1) ***Federal Law.*** The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(2) ***State Law.*** On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

Notice of a Lawsuit and Request to Waive Service of Summons.

(Caption)

To (*name the defendant or -- if the defendant is a corporation, partnership, or association -- name an officer or agent authorized to receive service*):

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Date: _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

Waiver of the Service of Summons.

(Caption)

To (*name the plaintiff's attorney or the unrepresented plaintiff*):

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from_____, the date when this request was

sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

(Attach the following)

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does not include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By

signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

CREDIT(S)

(Amended January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; April 29, 1980, effective August 1, 1980; amended by Pub.L. 97-462, § 2, January 12, 1983, 96 Stat. 2527, effective 45 days after January 12, 1983; amended March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 30, 2007, effective December 1, 2007; April 29, 2015, effective December 1, 2015; April 28, 2016, effective December 1, 2016; April 27, 2017, effective December 1, 2017.)

Footnotes

1 The drafting of the rules and amendments is actually done by a committee of the Judicial Conference of the United States. In the case of the Federal Rules of Civil Procedure, the initial draft is prepared by the Advisory Committee on Civil Rules. The Advisory Committee's draft is then reviewed by the Committee on Rules of Practice and Procedure, which must give its approval to the draft. Any draft approved by that committee is forwarded to the Judicial Conference. If the Judicial Conference approves the draft, it forwards the draft to the Supreme Court. The Judicial Conference's role in the rule-making process is defined by 28 U.S.C. 331.

2 All of the other amendments, including all of the proposed amendments to the Federal Rules of Criminal Procedure and the Rules and Forms Governing Proceedings in the United States District Courts under sections 2254 and 2255 of Title 28, United States Code, took effect on August 1, 1982, as scheduled.

3 The President has urged Congress to act promptly. See President's Statement on Signing H.R. 6663 into Law, 18 Weekly Comp. of Pres. Doc. 982 (August 2, 1982).

4 Where service of a summons is to be made upon a party who is neither an inhabitant of, nor found within, the state where the district court sits, subsection (e) authorizes service under a state statute or rule of court that provides for service upon such a party. This would authorize mail service if the state statute or rule of court provided for service by mail.

5 The Court's proposal authorized service by the Marshals Service in other situations. This authority, however, was not seen as thwarting the underlying policy of limiting the use of marshals. *See* Appendix II, at 16, 17 (Advisory Committee Note).

6 Appendix I, at 2 (letter of Assistant Attorney General Robert A. McConnell).

7 The provisions of H.R. 7154 conflict with 28 U.S.C. 569(b) because the latter is a broader command to marshals to serve all federal court process. As a later statutory enactment, however, H.R. 7154 supersedes 28 U.S.C. 569(b), thereby achieving the goal of reducing the role of marshals.

8 Proposed Rule 4(d)(8) provided that "Service ... shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant." This provision reflects a desire to preclude default judgments on unclaimed mail. See Appendix II, at 7 (Report of the Committee on Rules of Practice and Procedure).

9 *See* p. 15 infra.

10 Proponents of the California system of mail service, in particular, saw no reason to supplant California's proven method of mail service with a certified mail service that they believed likely to result in default judgments without actual notice to defendants. See House Report No. 97-662, at 3 (1982).

11 The parties may, of course, stipulate to service, as is frequently done now.

12 While return of the letter as unclaimed was deemed service for the purpose of determining whether the plaintiff's action could be dismissed, return of the letter as unclaimed was not service for the purpose of entry of a default judgment against the defendant. See note 8 supra.

13 The law governing the tolling of a statute of limitation depends upon the type of civil action involved. In a diversity action, state law governs tolling. *Walker v. Armco Steel Corp.,* 446 U.S. 740 (1980). In *Walker,* plaintiff had filed his complaint and thereby commenced the action under Rule 3 of the Federal Rules of Civil Procedure within the statutory period. He did not, however, serve the summons and complaint until after the statutory period had run. The Court held that state law (which required both filing and service within the statutory period) governed, barring plaintiff's action.

14 The same result obtains even if service occurs within the 120 day period, if the service occurs after the statute of limitation has run.

15 See p. 19 infra.

16 See p. 17 infra.

17 Rule 45(c) provides that "A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age."

18 Some litigators have voiced concern that there may be situations in which personal service by someone other than a member of the Marshals Service may present a risk of injury to the person attempting to make the service. For example, a hostile defendant may have a history of injuring persons attempting to serve process. Federal judges undoubtedly will consider the risk of harm to private persons who would be making personal service when deciding whether to order the Marshals Service to make service under Rule 4(c)(2)(B)(iii).

19 The methods of service authorized by Rule 4(c)(2)(C) may be invoked by any person seeking to effect service. Thus, a nonparty adult who receives the summons and complaint for service under Rule 4(c)(1) may serve them personally or by mail in the manner authorized by Rule 4(c)(2)(C)(ii). Similarly, the Marshals Service may utilize the mail service authorized by Rule 4(c)(2)(C)(ii) when serving a summons and complaint under Rule 4(c)(2)(B)(i)(iii). When serving a summons and complaint under Rule 4(c)(2)(B)(ii), however, the Marshals Service must serve in the manner set forth in the court's order. If no particular manner of service is specified, then the Marshals Service may utilize Rule 4(c)(2)(C)(ii). It would not seem to be appropriate, however, for the Marshals Service to utilize Rule 4(c)(2)(C)(ii) in a situation where a previous attempt to serve by mail failed. Thus, it would not seem to be appropriate for the Marshals Service to attempt service by regular mail when serving a summons and complaint on behalf of a plaintiff who is proceeding in forma pauperis if that plaintiff previously attempted unsuccessfully to serve the defendant by mail.

20 To obtain service by personnel of the Marshals Service or someone specially appointed by the court, a plaintiff who has unsuccessfully attempted mail service under Rule 4(c)(2)(C)(ii) must meet the conditions of Rule 4(c)(2)(B)--for example, the plaintiff must be proceeding *in forma pauperis.*

21 For example, the sender must state the date of mailing on the form. If the form is not returned to the sender within 20 days of that date, then the plaintiff must serve the defendant in another manner and the defendant may be liable for the costs of such service. Thus, a defendant would suffer the consequences of a misstatement about the date of mailing.

22 See p. 12 supra.

23 The 120 day period begins to run upon the filing of each complaint. Thus, where a defendant files a cross-claim against the plaintiff, the 120 day period begins to run upon the filing of the cross-complaint, not upon the filing of the plaintiff's complaint initiating the action.

24 The person who may move to dismiss can be the putative defendant (i.e., the person named as defendant in the complaint filed with the court) or, in multi-party actions, another party to the action. (If the putative defendant moves to dismiss and the failure to effect service is due to that person's evasion of service, a court should not dismiss because the plaintiff has "good cause" for not completing service.)

25 See Cal.Civ.Pro. § 415.30 (West 1973).

26 See p. 16 supra.

** Delete if inappropriate.

Fed. Rules Civ. Proc. Rule 4, 28 U.S.C.A., FRCP Rule 4
Including Amendments Received Through 5-1-20

End of Document

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HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

14. CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS[1]

(Concluded 15 November 1965)

The States signatory to the present Convention,
Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,
Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.
This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I – JUDICIAL DOCUMENTS

Article 2

Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.
Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.
The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under “Conventions” or under the “Service Section”. For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Dixième session (1964)*, Tome III, *Notification* (391 pp.).

ADDENDUM

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –

a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph *(b)* of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each Contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another Contracting State which are designated by the latter for this purpose.

Each Contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with –

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more Contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding Articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.
The applicant shall pay or reimburse the costs occasioned by –-
a) the employment of a judicial officer or of a person competent under the law of the State of destination,
b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security. It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.
The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that –
a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or
b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,
and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled –
a) the document was transmitted by one of the methods provided for in this Convention,
b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled –

a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This Article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II – EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention.

CHAPTER III – GENERAL CLAUSES

Article 18

Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more Contracting States to dispense with –

a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of Article 3,

b) the language requirements of the third paragraph of Article 5 and Article 7,

c) the provisions of the fourth paragraph of Article 5,

d) the provisions of the second paragraph of Article 12.

Article 21

Each Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following –

a) the designation of authorities, pursuant to Articles 2 and 18,

b) the designation of the authority competent to complete the certificate pursuant to Article 6,

c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to Article 9.

Each Contracting State shall similarly inform the Ministry, where appropriate, of –

a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,

b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,

c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.
These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.
It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.
The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

ADDENDUM

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.
In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.
At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.
If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.
It may be limited to certain of the territories to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following –

a) the signatures and ratifications referred to in Article 26;
b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;
c) the accessions referred to in Article 28 and the dates on which they take effect;
d) the extensions referred to in Article 29 and the dates on which they take effect;
e) the designations, oppositions and declarations referred to in Article 21;
f) the denunciations referred to in the third paragraph of Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS SEVENTY-FIRST YEAR
MONTEREY, CALIFORNIA
JULY 30 – AUGUST 4, 1962

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
February 4, 1963

UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Foreign Money-Judgments Recognition Act was as follows:

JAMES C. DEZENDORF, Pacific Bldg., Portland, Ore., *Chairman*.
JOE C. BARRETT, McAdams Trust Bldg., Jonesboro, Ark.
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KURT H. NADELMANN, Harvard Law School, Cambridge, Mass., *Draftsman*

Assisted by

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Copies of all Uniform Acts and other printed matter issued by the Conference may be obtained from

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
1155 East Sixtieth Street
Chicago 37, Illinois

UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

PREFATORY NOTE

In most states of the Union, the law on recognition of judgments from foreign countries is not codified. In a large number of civil law countries, grant of conclusive effect to money-judgments from foreign courts is made dependent upon reciprocity. Judgments rendered in the United States have in many instances been refused recognition abroad either because the foreign court was not satisfied that local judgments would be recognized in the American jurisdiction involved or because no certification of existence of reciprocity could be obtained from the foreign government in countries where existence of reciprocity must be certified to the courts by the government. Codification by a state of its rules on the recognition of money-judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad.

The Act states rules that have long been applied by the majority of courts in this country. In some respects the Act may not go as far as the decisions. The Act makes clear that a court is privileged to give the judgment of the court of a foreign country greater effect than it is required to do by the provisions of the Act. In codifying what bases for assumption of personal jurisdiction will be recognized, which is an area of the law still in evolution, the Act adopts the policy of listing bases accepted generally today and preserving for the courts the right to recognize still other bases. Because the Act is not selective and applies to judgments from any foreign court, the Act states that judgments rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law shall neither be recognized nor enforced.

The Act does not prescribe a uniform enforcement procedure. Instead, the Act provides that a judgment entitled to recognition will be enforceable in the same manner as the judgment of a court of a sister state which is entitled to full faith and credit.

In the preparation of the Act codification efforts made elsewhere have been taken into consideration, in particular, the [British] Foreign Judgments (Reciprocal Enforcement) Act of 1933 and a Model Act produced in 1960 by the International Law Association. The Canadian Commissioners on Uniformity of Legislation, engaged in a similar endeavor, have been kept informed of the progress of the work. Enactment by the states of the Union of modern uniform rules on recognition of foreign money-judgments will support efforts toward improvement of the law on recognition everywhere.

UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

[Be it enacted . . . .]

SECTION 1. [*Definitions*.] As used in this Act:

(1) "foreign state" means any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands;

(2) "foreign judgment" means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.

SECTION 2. [*Applicability*.] This Act applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.

Comment

Where an appeal is pending or the defendant intends to appeal, the court of the enacting state has power to stay proceedings in accordance with section 6 of the Act.

SECTION 3. [*Recognition and Enforcement*.] Except as provided in section 4, a foreign judgment meeting the requirements of section 2 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.

Comment

The method of enforcement will be that of the Uniform Enforcement of Foreign Judgments Act of 1948 in a state having enacted that Act.

SECTION 4. [*Grounds for Non-Recognition*.]

(a) A foreign judgment is not conclusive if

(1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.

(b) A foreign judgment need not be recognized if

(1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

(2) the judgment was obtained by fraud;

(3) the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

Comment

The first ground for non-recognition under subsection (a) has been stated authoritatively by the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S. 113, 205 (1895). As indicated in that decision, a mere difference in the procedural system is not a sufficient basis for non-recognition. A case of serious injustice must be involved.

The last ground for non-recognition under subsection (b) authorizes a court to refuse recognition and enforcement of a judgment rendered in a foreign country on the basis only of personal service when it believes the original action should

have been dismissed by the court in the foreign country on grounds of *forum non conveniens*.

SECTION 5. [*Personal Jurisdiction*.]

(a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if

(1) the defendant was served personally in the foreign state;

(2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;

(3) the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;

(4) the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;

(5) the defendant had a business office in the foreign state and the proceedings in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign state; or

(6) the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a [cause of action] [claim for relief] arising out of such operation.

(b) The courts of this state may recognize other bases of jurisdiction.

Comment

New bases of jurisdiction have been recognized by courts in recent years. The Act does not codify all these new bases. Subsection (b) makes clear that the Act does not prevent the courts in the enacting state from recognizing foreign judgments rendered on the bases of jurisdiction not mentioned in the Act.

SECTION 6. [*Stay in Case of Appeal*.] If the defendant satisfies the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.

SECTION 7. [*Saving Clause*.] This Act does not prevent the recognition of a foreign judgment in situations not covered by this Act.

SECTION 8. [*Uniformity of Interpretation*.] This Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

SECTION 9. [*Short Title*.] This Act may be cited as the Uniform Foreign Money-Judgments Recognition Act.

SECTION 10. [*Repeal*.] [The following Acts are repealed:

(1)

(2)

(3) .]

SECTION 11. [*Time of Taking Effect*.] This Act shall take effect . . . .

2010 Mass.App.Div. 36
Massachusetts Appellate Division,
District Court Department,
Southern District.

David J. FRIED
v.
WELLESLEY MAZDA
and another. [1]

1 Hometown Auto Framingham, Inc.

No. 08–ADMS–40032.
|
Heard Jan. 30, 2009.
|
Opinion Certified March 9, 2010.

Synopsis

Background: Customer brought action against automotive corporation that had provided him with a "loaner" vehicle that customer had been driving at time of traffic accident. After entering default judgment against corporation, the District Court Department, Brookline Division, May, J., denied corporation's motion to vacate default judgment, and corporation appealed.

Holdings: The District Court Department, Appellate Division, Singh, J., held that:

corporation was not prejudiced by lack of personal service of process; but

customer's damages were not in a sum certain, as required to allow entry of default judgment; and

good cause existed to set aside default.

Reversed and remanded.

In the Brookline Division, Docket No. 0809–CV–0032, May, J.

Attorneys and Law Firms

David J. Friend, Esq., Cambridge, MA, for plaintiff.

Robert H. Flynn, Esq., Flynn Law Finn, P.C., Wellesley, MA, for defendants.

Before WILLIAMS, P.J., McCALLUM [2] & SINGH, JJ.

2 The Honorable Paul J. McCallum participated in the hearing of this appeal, but resigned from the Appellate Division prior to the issuance of this opinion.

OPINION

SINGH, J.

***1** While operating a "loaner" car he had obtained from Hometown Auto Framingham, Inc. ("Hometown Auto"), doing business as Wellesley Mazda ("Wellesley Mazda"), plaintiff David J. Fried ("Fried") struck the vehicle of Samuel Grimes ("Grimes") at a toll booth on the Massachusetts Turnpike. Fried

paid $2,226.40 to Grimes in exchange for a release of liability. Fried then sued Hometown Auto and Wellesley Mazda on February 1, 2008 for knowing and wilful violations of G.L.c. 93A and "retaliation."

On February 14, 2008, Fried served both Hometown Auto, a Massachusetts corporation, and Wellesley Mazda by certified mail, the former through its registered agent, National Registered Agents, Inc. ("NRA"), located in Boston and the latter at its Wellesley address. The record appendix contains signed return receipt cards for both named defendants. NRA's was date stamped February 15, 2008, and Wellesley Mazda's, February 23, 2008. No answer to the complaint was filed, and a default judgment in the amount of $6,679.20, plus interest and costs, was entered against the defendants on April 2, 2008.

On April 8, 2008, Attorney Thomas T. Worboys ("Worboys") filed his notice of appearance as counsel for the defendants, together with a motion to dismiss and for sanctions. He withdrew the motion on April 29, 2008 upon discovering that a default judgment had already been entered.

On May 21, 2008, the defendants moved to vacate the default judgment[3] as void because (1) Wellesley Mazda is merely a trade name of Hometown Auto, not a separate legal entity that could be sued, and (2) as a domestic corporation, neither Hometown Auto, nor its agent, could be served properly by mail. The defendants also asserted excusable neglect. In a supporting affidavit, Joseph Shaker ("Shaker"), the president of Hometown Auto, made the following representations regarding his receipt of the summons and complaint and the circuitous route those documents followed before finally reaching Atty. Worboys: (1) Shaker received notice from NRA on February 26, 2008 that Fried had attempted service by mail; (2) Shaker forwarded that correspondence the next day to Hometown Auto's insurer; (3) the insurer asked a Connecticut law firm to defend the matter; (4) on March 25, 2008, having no lawyers licensed to practice in Massachusetts, the Connecticut law firm forwarded the summons and complaint to a Natick attorney, Colleen M. Canoni ("Canoni"); and (5) Canoni forwarded the summons and complaint to Worboys on April 7, 2008.

3 In their motion to vacate the default judgment, the defendants failed to specify the subsection of Mass. R. Civ. P. 60(b) under which they were moving. The substance of their motion makes clear, however, that they sought Rule 60(b)(4) or 60(b)(1) relief.

After hearing, the trial judge denied the defendants' motion to vacate the default judgment, noting on the face of the motion that "President Shaker acknowledged receipt of papers on 2/26/08 and still no answer or other responsive pleading was filed [until] 4/11/08."[4] This appeal followed.

4 The judge mistakenly indicated that the defendants had filed their motion to dismiss on April 11, 2008. The docket indicates that the

motion was filed on April 8, 2008, but the entry date for the notation was April 11, 2008.

1. The defendants first argue, and Fried concedes, that the default judgment entered against Wellesley *Mazda* is void because Wellesley Mazda is merely a trade name of Hometown Auto, not a separate entity subject to suit. It is generally accepted that use of the designation "doing business as" does not create a separate legal entity, see, e.g., *Bauer v. Pounds,* 61 Conn.App. 29, 762 A.2d 499, 504 (Conn.App.Ct.2000) (collecting cases), that may be made a party defendant. See *Belson v. Thayer & Assocs., Inc.,* 32 Mass.App.Ct. 256, 256 n. 1, 588 N.E.2d 695 (1992). In this case, Shaker asserted in an unrebutted affidavit that "Wellesley Mazda is not a business entity; it is a d/b/a of Hometown Auto." Thus, Wellesley Mazda should have been granted Rule 60(b)(4) relief, and we reverse the denial of the defendants' motion to vacate the default judgment entered against it.

***2** 2. The defendants also assert that the default judgment entered against Hometown Auto is void for lack of personal jurisdiction because of Fried's failure to effect service of process in compliance with Mass. R. Civ. P. 4.

"If a judgment is void for lack of subject matter or personal jurisdiction, or for failure to conform to the requirements of due process of law, the judge must vacate it." *Wang v. Niakaros,* 67 Mass.App.Ct. 166, 169, 852 N.E.2d 699 (2006). "A judge has no discretion to deny a request for relief from judgment brought under rule 60(b)(4)...." *Colley v. Benson, Young & Downs Ins. Agency, Inc.,* 42 Mass.App.Ct. 527, 533, 678 N.E.2d 440 (1997).

Generally, proper service of process under Rule 4 is necessary not only for a court to acquire personal jurisdiction over a defendant, but also for a party to satisfy the due process requirements of notice and an opportunity to be heard. See *Wang, supra* 171, 172. It is clear in this case that service of process by Fried by certified mail on NRA did not constitute good service under Rule 4. As Hometown Auto is a domestic corporation with a registered agent, Fried was obligated to make service upon that corporation "by a sheriff, by his deputy, or by a special sheriff; by any other person duly authorized by law; [or] by some person specially appointed by the court for that purpose," Rule 4(c), "by delivering a copy of summons and of the complaint to an officer, to a managing or general agent, or to the person in charge of the business at the principle place of business thereof within the Commonwealth, if any; or by delivering such copies to any other agent authorized by appointment or by law to receive service of process, provided that any further notice required by law be given." Rule 4(d)(2). See *Beaver Brook Farms, Inc. v. Towers Realty Investors, Inc.,* 1999 Mass.App. Div. 124, 125 ("The type of service required by Rule 4 to be made upon an agent of a corporation is the type of service that would be required if the agent were the defendant.").

But the defense of a lack of personal jurisdiction "may be waived by conduct, express submission, or extended inaction," *Lamarche v. Lussier,* 65 Mass.App.Ct. 887, 889, 844 N.E.2d 1115 (2006), and noncompliance with Rule 4 may be overlooked without violating due process. [5] Regarding due process, the Appeals Court in *Wang, supra,* held that the plaintiff's failure to serve his amended complaint on the defendant in compliance with Rule 4 violated due process, but noted that both the pleadings and appellate briefs contained assertions that defense counsel knew of the amended complaint and engaged in a pattern of delay and evasion. *Id.* at 171, 852 N.E.2d 699. Citing Federal cases for the proposition that "technical deficiencies" in service may be ignored, the Court noted in dicta that "[d]epending on the extent to which these or similar charges can be substantiated by admissible evidence, they might form an adequate basis for the judge to find that actual knowledge and continued participation in the litigation by [the defendant] excused [the plaintiff] from specific compliance with rule 4." *Id.* See also *Libertad v. Welch,* 53 F.3d 428, 440 (1st Cir.1995), cited in *Wang, supra* at 171, 852 N.E.2d 699 ("When an alleged defect in service is due to a minor, technical error, only actual prejudice to the defendant or evidence of a flagrant disregard of the requirements of the rules justifies dismissal."); *Richardson v. Metro Health Found.,* 209 F.R.D. 283, 284 (D.Mass.2002) (finding service sufficient under Federal R. Civ. P. 4 where, though the U.S. Marshals Service impermissibly served corporate defendant by certified mail, defendant had actual knowledge of process and asserted no prejudice).

5 "A determination whether a defendant has waived the defense of personal jurisdiction closely tracks the inquiry related to determine whether noncompliance with rule 4 can be overlooked without violating due process requirements." *Wang, supra* at 172, 852 N.E.2d 699.

***3** It is undisputed that Hometown Auto received actual notice of the lawsuit well before the entry of a default judgment against it. Unlike *Wang,* where the record lacked admissible evidence supporting a justification for noncompliance with Rule 4, Shaker averred in an affidavit attached to the motion to vacate default judgment that "[o]n or about February 26, 2008, I received a notice from National Registered Agents, Inc., in Boston, to the effect that Attorney Fried had attempted to serve Hometown Auto Framingham, Inc. by mail." Further, the defendants failed to demonstrated that they were prejudiced by the technically deficient service, as they did not show that NRA would have notified Hometown Auto more quickly had process been delivered to the agent by sheriff. [6]

6 Given our disposition of this issue, we need not address Fried's additional argument that the defendants waived the right to contest personal jurisdiction under Mass. R. Civ. P. 12(g) and 12(h)(1) by failing to raise that defense in their first Rule 12 motion, although we note that fee defendants withdrew that motion before it was acted upon.

3. The defendants' final argument is that the trial judge abused his discretion in denying their motion to vacate the default

judgment pursuant to Mass. R. Civ. P. 60(b). We do not reach the issue because we find that the default judgment was entered erroneously. The defendants first had actual notice of the complaint on February 26, 2008, making their answer due on March 17, 2008. As the defendants did not file a responsive pleading by this date, the clerk entered a default judgment on April 2, 2008. The clerk was not authorized to do so. A district court clerk may enter a default judgment only when the plaintiffs claim against a defendant is for a "sum certain or for a sum which can by computation be made certain." Mass. R. Civ. P. 55(b)(3). That phrase has been equated with the concept of liquidated damages, which are

> damages agreed upon as to amount by the parties, or fixed by operation of law, or under the correct applicable principles of law made certain in amount by the terms of the contract, or susceptible of being certain in amount by mathematical calculations from factors which are or ought to be in the possession or knowledge of the party to be charged. Unliquidated damages are those which cannot thus be made certain by one of the parties alone.

Pilgrim Pools, Inc. v. Perry, 1979 Mass.App. Div. 455, 458–459, quoting *Cochrane v. Forbes,* 267 Mass. 417, 420, 166 N.E. 752 (1929). See *Jackson v. Corley,* 1997 Mass.App. Div. 25, 27 (clerk not authorized to enter default judgment in claim for damages arising out of automobile accident); *Maiuri v. Tagessian,* 1993 Mass.App. Div. 149, 151 (damages claim for personal injuries not claim for "sum certain," and thus clerk may not enter judgment).

Here, Fried claimed damages in his complaint resulting from the alleged G.L.c. 93A violation and retaliation. The mere fact that Fried reduced his claim for damages to a certain number does not make the number a "sum certain." The defendants at no time agreed to any form of damages, as would be the case with liquidated damages. Nor were they in possession of any facts from which they could calculate any such damages. See *Sound Sellers, Inc. v. Kaitz,* 1981 Mass.App. Div. 36, 38 (claim for goods sold and delivered not "sum certain" case). Further, on Fried's G.L.c. 93A claim, the defendants had a right to challenge the issue of multiple damages, even after default. See *Zorach v. Lenox Oil Co.,* 1996 Mass.App. Div. 11, 13 ("sum certain" requirement may not be met in cases where defendant may raise issues dealing with liability after default,

"especially as regards damages under G.L.c. 93A").

***4** The clerk was authorized to enter a default pursuant to Mass. R. Civ. P. 55(a). Upon such a default, the defendant would have been able to move to set aside entry of the default "[f]or good cause shown." Mass. R. Civ. P. 55(c). The reasons required to set aside a default under Rule 55(c) are far less onerous than the grounds required to vacate a default judgment pursuant to Mass. R. Civ. P. 60(b). See *Broome v. Broome,* 40 Mass.App.Ct. 148, 152, 662 N.E.2d 224 (1996), quoting 10 Wright, Miller & Kane, Federal Practice & Procedure § 2696, at 514–515 (2d ed. 1983 & Supp.1995) ("[I]n various situations a default entry [under Rule 55] may be set aside for reasons that would not be enough to open a default judgment."). Under Rule 55(c), a defendant must show good cause for removing the default and a meritorious claim or defense. See *Clamp–All Corp. v. Foresta,* 53 Mass.App.Ct. 795, 806–807, 763 N.E.2d 60 (2002). Cf. *Berube v. McKesson Wine & Spirits Co.,* 7 Mass.App.Ct. 426, 430–431, 388 N.E.2d 309 (1979) (setting forth stringent requirements for vacating default judgment under Rule 60(b)). "Although an adequate basis for the motion must be shown, any doubt should be resolved in favor of setting aside defaults so that cases may be decided on their merits." Reporters' Notes to Mass. R. Civ. P. 55.

Ordinarily, we would return the case for a determination as to whether the defendants established "good cause" under Rule 55(c). In this case, however, the motion judge has retired. Returning this case would raise the issue only before another judge unfamiliar with the case. Because the issue was presented to the judge on documentary evidence, we are in as good a position as the motion judge (or any judge on remand) to decide the issue. See *Commissioner of Revenue v. Comcast Corp.,* 453 Mass. 293, 317 n. 28, 901 N.E.2d 1185 (2009) (remand not necessary where appellate court in as good a position as trial court to decide issue based on documentary evidence); *Commonwealth v. Hicks,* 50 Mass.App.Ct. 215, 217, 736 N.E.2d 431 (2000) (where motion judge had retired and appellate court was in as good a position as motion judge to decide issue, court found no good purpose would be served by remand).

In reviewing the defendants' submission, we note that the defendants provided an affidavit outlining the confusion caused by Fried's improper service and explained how that confusion led to delays in responding to the complaint —ultimately, a 22–day delay in filing a responsive pleading. After learning that a default judgment had already entered, the defendants moved to vacate the judgment within 42 days. The defendants also asserted a meritorious defense, supported by case law, indicating that Fried was bound by the contract he signed in taking the loaner car, absent fraud, which Fried did not establish in his complaint. Given this showing, we find that the defendants

met their burden in demonstrating good cause to set aside entry of the default.

The denial of the defendants' motion to vacate default judgment is reversed. The case is returned to the Brookline Division for trial.

***5** So ordered.

All Citations

Not Reported in N.E.2d, 2010 Mass.App.Div. 36, 2010 WL 1139322

ADDENDUM

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SONIA EDUARDO FRANCO, et al., Plaintiffs, v. THE DOW CHEMICAL COMPANY, SHELL CHEMICAL COMPANY, and DOLE FOOD COMPANY, INC. Defendants.	CASE NO. CV 03-5094 NM (PJWx) ORDER GRANTING MOTIONS TO DISMISS BY DOLE FOOD COMPANY, INC., SHELL CHEMICAL COMPANY, AND THE DOW CHEMICAL COMPANY

I. INTRODUCTION

On May 14, 2003, 466 residents of Nicaragua ("Plaintiffs") filed their Complaint against The Dow Chemical Company, Shell Chemical Company, and Dole Food Company, Inc. (collectively, "Defendants") in Los Angeles Superior Court. Compl.; Shell Chemical Company's Mot. to Dismiss at 1. Plaintiffs sought recognition of a judgment by a Nicaraguan district court pursuant to California's Uniform Foreign Money-Judgments Recognition Act ("Recognition Act") and "general principles of comity among nations." Compl. ¶ 3.

On July 17, 2003, Defendants removed the case under 28 U.S.C. §§ 1441 and 1446. Defendants asserted that diversity jurisdiction exists because the only resident defendant named in the Complaint, Dole Food Company, Inc., was not a party to the foreign court action, was not named in the judgment, and thus was fraudulently joined. Notice of Removal ¶ 1. On July 23, 2003, Dole Food

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Company, Inc. moved to dismiss. The Dow Chemical Company and Shell Chemical Company moved to dismiss on July 24, 2003. Plaintiffs moved to remand the case on August 15, 2003. In light of the court's denial of Plaintiffs' motion to remand, the court now considers Defendants' motions to dismiss.

II. FACTS

Plaintiffs allege that The Dow Chemical Company and Shell Chemical Company manufactured a fumigant known as 1,2-dibromo-3-chloropropane ("DBCP"). Mot. to Remand at 2. Dole Food Company, Inc. allegedly used DBCP on its banana plantations in Nicaragua from 1973 until it left in the mid-1980s. Id. at 2-3. Plaintiffs filed lawsuits in Nicaragua based on Special Law 364. Compl. ¶ 10. Enacted on October 5, 2000 for DBCP litigation, the law requires defendants to deposit $100,000 within 90 days of service of a complaint in order "to take part in a lawsuit." Compl. ¶ 10; Shell Chemical Company's Mot. to Dismiss, Ex. 4B (The Gazette) at 178-79.[1] The law further requires DBCP manufacturers to deposit 300,000,000 cordobas (more than $20 million) within 90 days of receiving notice of a complaint. Shell Chemical Company's Mot. to Dismiss, Ex. 4B at 179; Pls. Opp. to Remand at 3.

The complaints filed in Nicaraguan court named, among other defendants, "Dow Chemical, also known as Dow Agro Sciences[,]" "Shell Oil Company[,]" and "Dole Food Corporation Inc." See, e.g., Notice of Removal, Ex. 3 (Nicaraguan Complaint) at 126. The complaints did *not* name Dole Food *Company*, Inc. or Shell *Chemical* Company as defendants. See id. Shell Chemical Company is "an entirely distinct juridical entity" from Shell Oil Company. Shell Chemical Company's Mot. to Dismiss at 6 n. 12.

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[1] The court will cite to the certified translations of documents originally in Spanish. Plaintiffs have not challenged the accuracy of the translations.

Dole Food Company, Inc. has never had a subsidiary named Dole Food Corporation or Dole Food Corporation Inc. Notice of Removal, Ex. 4 (Decl. of C. Michael Carter) at 150. Dole Food Corporation Inc. does not exist. Id. The entity that does exist, Dole Food Company, Inc., is nowhere named as a defendant in the Nicaraguan complaints. See, e.g., Notice of Removal, Ex. 3 (Nicaraguan Complaint). Despite the fact that it was not named as a defendant, counsel for Dole Food Company, Inc. and its subsidiary, Dole Fresh Fruit Company, attempted to appear and defend themselves in the Nicaraguan action. Dr. Roberto Arguello Hurtado ("Hurtado"), local counsel for Dole Fresh Fruit Company, deposited $100,000 to participate in the proceedings. See id., Ex. 8B (Judgment) at 210.

On October 13, 2002, the Nicaraguan judge revoked legal intervention by Hurtado on behalf of "Dole Fresh Fruit Company, which is not a party to the lawsuit in question[.]" Id., Ex. 6B (Judicial Notice) at 163. The deposit was later returned because Hurtado, "in his capacity of special judicial representative of the company Dole Fresh Fruit Company," was not part of the proceeding. See id., Ex. 8B (Judgment) at 210. On November 25, 2002, the judge also denied intervention by Hurtado as a representative for Dole Food Company because "his client was not one of the companies named in the complaint." Id., Ex. 8B (Judgment) at 199, Ex. 5B (Judicial Notice) at 156.

Plaintiffs allege they served The Dow Chemical Company on February 5, 2002, but fail to attach documentation of such service to their Complaint or other pleadings. Compl. ¶ 9 ("Service of the nine complaints which are the subject of the Judgment were effectuated as follows: . . . Dow was service [sic] February 5, 2002"). On February 5, 2002, service was in fact made upon "Dow Agro Sciences, aka, Dow Chemical" in Indiana. See The Dow Chemical Company's Mot. to Dismiss, Ex. 1 (Record of Service of Foreign Judicial Document) at 10. Dow AgroSciences LLC, a Delaware corporation, has its principal place of

business in Indiana, while The Dow Chemical Company, a Delaware corporation, has its principal place of business in Michigan. The Dow Chemical Company's Mot. to Dismiss, Ex. 1 (Dow AgroSciences LLC's Mot. to Quash Improper Service) at 12; Compl. ¶ 5.

On April 1, 2002, the U.S. District Court for the Southern District of Indiana granted Dow AgroSciences LLC's motion to quash service for failure to serve the proper party. See The Dow Chemical Company's Mot. to Dismiss, Ex. 1 (Order Granting Dow AgroSciences LLC's Mot. to Quash) at 1. In its Motion to Quash, Dow AgroSciences LLC explained that it is: (1) a separate limited liability company from The Dow Chemical Company, (2) not The Dow Chemical Company's agent for service of process, and (3) not "also known as" The Dow Chemical Company. See id., Ex. 1 (Dow AgroSciences LLC's Mot. to Quash Improper Service) at 6.

In a June 24, 2002 Minute Order, the Nicaraguan court declared "Dow Chemical, also known as Dow Agro Sciences" in default for failing to answer after receiving notice on February 15, 2002. Decl. of Paul A. Triana in Further Support of Pls. Mot. to Remand and Opp. to Defs. Mot. to Dismiss, Ex. 5 (certified translation of June 24, 2002 Minute Order) at 68. It is unclear whether the Nicaraguan court is referring to the February 5, 2002 service in Indiana, but noted the wrong date.

On December 11, 2002, the Nicaraguan court entered a $489.4 million judgment against four companies Plaintiffs had named in their complaints: "Dow Chemical, also known as Dow Agro Sciences," "Shell Oil Company," "Standard Fruit and Vegetables Co. Inc.," and "Dole Food Corporation Inc." Notice of Removal, Ex. 8B (Judgment) at 200, 209. These names appear in English in the Spanish version of the Judgment. Id., Ex. 8A (Judgment) at 181. Shell Chemical Company is nowhere mentioned in the Judgment. See id., Ex. 8A (Judgment). The Judgment recites that the judge denied intervention by Hurtado on behalf of

Dole Food Company because "his client was not one of the companies named in the complaint." Id., Ex. 8B (Judgment) at 199.

The Judgment also states that "defendant company Dow Chemical did not appear to exercise its rights and therefore, in a subsequent order, said company was declared in contempt (*rebeldia*)." Id. at 198. After this ruling, Dr. Yali Molina Palacios "appeared in his capacity as special representative of Dow Chemical Company objecting to the lack of jurisdiction (*competencia*) of the national [Nicaraguan] courts, but the latter attorney was not allowed to join the suit because the company he represented had been declared in contempt (*rebelde*) and did not request the lifting of the contempt (*rebeldia*)." Id. at 200.

Though Plaintiffs seek to enforce this Judgment, they failed to attach a copy to their Complaint. Instead, they attached a "translated version of the Writ of Execution" that allegedly was issued on January 23, 2003. Compl. ¶ 2. The attached document appears to be an affidavit signed on April 24, 2003 (almost three months after the alleged writ of execution) by Miguel Angel Caceres Palacios, attorney and notary public, at the request and in the presence of Plaintiffs' lead Nicaraguan attorney, Angel Espinoza, and a translator. Notice of Removal, Ex. 1B (Notary Affidavit) at 91-93; Pls. Opp. to Remand at 11. The notary's signature is certified as authentic by Alfonso Valle Pastora, clerk of the Nicaraguan Supreme Court, followed by the statement that "[n]either the undersigned Clerk nor the Supreme Court is responsible for the contents of the document." Notice of Removal, Ex. 1B (Notary Affidavit) at 93.

The Notary Affidavit orders the following four companies to pay the Plaintiffs: "Dow Chemical Company, also known as Dow Agro Sciences, Shell Chemical Company, Standard Fruit and Vegetables and Dole Food Company Inc." Id., Ex. 1A (Notary Affidavit) at 50. However, neither Shell Chemical Company nor Dole Food Company, Inc. was named in the Judgment. The Notary Affidavit recites facts inconsistent with the naming of Dole Food Company Inc. as a party to

the underlying action: "Dr. Roberto Arguello Hurtado appeared in his capacity as legal representative for Dole Food Company stating that the interests of his client could be affected by the complaint, and requesting to be given legal standing, which was denied since his client was not one of the companies sued[.]" Id. at 45.[2] It also states that Hurtado was the attorney for "dole [sic] Food Company, Inc.," "one of the companies that has not been sued." Id.

III. DISCUSSION

A. Legal Standard

Dismissal for failure to state a claim under Rule 12(b)(6) is appropriate if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Homedics, Inc. v. Valley Forge Ins. Co., 315 F.3d 1135, 1138 (9th Cir. 2003) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). When evaluating a Rule 12(b)(6) motion, the court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. See Barron v. Reich, 13 F.3d 1370, 1374 (9th Cir. 1994) (citation omitted). However, "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." Pareto v. Fed. Deposit Ins. Corp., 139 F.3d 696, 699 (9th Cir. 1998) (citation omitted).

Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (citation omitted). The Ninth Circuit has carved out

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[2] Shell Chemical Company asserts that the Notary Affidavit also states two different values to the judgment Plaintiffs seek to enforce: it specifies $489.4 million, but the sum of the individual awards is $440.4 million. See id. at 50-58; Shell Chemical Company's Mot. to Dismiss at 9-10. Plaintiffs do not deny this allegation, but insist that the Notary Affidavit "clearly lists a specific sum of money awarded to each plaintiff." Pls. Opp. to Shell Chemical Company's Mot. to Dismiss at 20.

three exceptions to this rule. First, a court may consider material properly submitted as part of the complaint. Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994) (citation omitted), cert. denied, 512 U.S. 1219 (1994). Second, a court may consider "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading[.]" Id. at 454. Third, a court may take judicial notice of matters of public record. Lee, 250 F.3d at 688-89 (citation omitted).

B. Application

1. ***Dole Food Company, Inc.***

Plaintiffs argue that they have adequately pled the requirements of the Recognition Act. Pls. Opp. to Dole Food Company's Mot. to Dismiss at 9. The Act states that a foreign judgment "that is final and conclusive and enforceable where rendered" is "conclusive between the parties to the extent that it grants or denies recovery of a sum of money." Cal. Civ. Proc. Code §§ 1713.2, 1713.3 (West 2003). The Act defines a "foreign judgment" as "any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters." Cal. Civ. Proc. Code § 1713.1(2) (West 2003).

Although Plaintiffs have pled that there is a final judgment between the parties that grants or denies a sum of money, the court is not limited to the pleadings in this case. The court may consider the Notary Affidavit because it was submitted as part of the Complaint. See Branch, 14 F.3d at 453. Even though Plaintiffs failed to attach the Judgment to their Complaint, the court may also consider that document because it qualifies not only as a document "whose contents are alleged in a complaint and whose authenticity no party questions," but also as a matter of public record. See id. at 454; Lee, 250 F.3d at 688-89. The court may also consider judicial notices issued by the Nicaraguan court, the Nicaraguan complaints, and The Gazette (the official journal of the National

Assembly of the Republic of Nicaragua) as matters of public record. See Lee, 250 F.3d at 688-89.

Here, the Judgment is not against Dole Food Company, Inc., but rather against Dole Food Corporation Inc. Notice of Removal, Ex. 8B (Judgment) at 200. Furthermore, the Judgment explicitly states that Dole Food Company was denied intervention because it "was not one of the companies named in the complaint[.]" Id. at 199; see also id., Ex. 5B (Judicial Notice) at 156. This disproves Plaintiffs' claim that there is a final judgment against Dole Food Company, Inc.

Plaintiffs attempt to plead around the Judgment by bringing their action "pursuant to the Writ of Execution issued on January 23, 2003, ***not*** based upon the judgment dated December 11, 2002." Pls. Opp. to Dole Food Company's Mot. to Dismiss at 10. However, Plaintiffs have failed to provide the writ of execution, submitting instead an affidavit that purports to be a translation. Notice of Removal, Ex. 1A (Notary Affidavit). This affidavit is suspect, not only because it changes the names of two parties that appeared in English in the Judgment, but because it contradictorily orders "Dole Food Company Inc." to pay, while reciting that neither "Dole Food Company" nor "dole [sic] Food Company, Inc." was a party to the action. See id. at 45, 50.

Even had Plaintiffs provided the actual writ of execution, this document would not be controlling for purposes of the Recognition Act. Plaintiffs contend that the writ of execution is the legal document that entitles plaintiffs to relief in this court. Pls. Opp. to Dole Food Company's Mot. to Dismiss at 10. This is a legal conclusion, not a factual allegation. See Pareto, 139 F.3d at 699 (conclusory allegations of law are "not sufficient to defeat a motion to dismiss"). Plaintiffs fail to provide any authority for this legal proposition that runs contrary to the plain

meaning of "judgment."[3] See Estate of Griswold v. See, 25 Cal. 4th 904, 911 (2001) (if the terms of a statute are unambiguous, the plain meaning of the language governs) (citations omitted). Although the Act does not define a "judgment," the term is commonly understood as a "court's final determination of the rights and obligations of the parties in a case." Black's Law Dictionary 846 (7th ed. 1999). Similarly, California law defines the term as "a judgment, order, or decree entered in a court of this state." Cal. Civ. Proc. Code § 680.230.

In contrast, California law separately defines a "writ." Cal. Civ. Proc. Code § 680.380 ("'Writ' includes a writ of execution, a writ of possession of personal property, a writ of possession of real property, and a writ of sale."). A writ of execution is a not a judgment, but instead a "process carrying into effect the directions in the judgment[.]" Gray v. Whitmore, 17 Cal. App. 3d 1, 18 (1971); see also Black's Law Dictionary at 590 (defining writ of execution as "[j]udicial enforcement of a money judgment"). Moreover, because the effect of the writ of execution is an issue of law, it does not, as Plaintiffs contend, create a disputed issue of fact. See Pls. Opp. to Dole Food Company's Mot. to Dismiss at 10.

Even assuming the writ of execution named Dole Food Company, Inc. as a defendant based on the Judgment against a different defendant, it would be a "violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." Parklane

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[3] Plaintiffs cite Herczog v. Herczog, 186 Cal. App. 2d 318, 320 (1960) for the proposition that case law does not limit application of the Act to legal documents entitled "Judgments." In that case, the court treated an English decree of separate maintenance as a judgment. Herczog, 186 Cal. App. 2d at 324. Decided in 1960, Herczog did not apply the Recognition Act, but rather Cal. Civ. Proc. Code § 1915, repealed in 1974. See Cal. Civ. Proc. Code §§ 1713, 1915 (West 2003). Nor would the Recognition Act apply, because the Act specifically excludes a "judgment for support in matrimonial or family matters." Cal. Civ. Proc. Code § 1713.1(2). In any case, Herczog does not sanction enforcing a writ of execution against defendants not named in the underlying judgment.

Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 n. 7 (1979) (citations omitted); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969) ("It is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been named a party by service of process.") (citation omitted). The Supreme Court has repeated this principle:

> Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.

Martin v. Wilks, 490 U.S. 762, 765 (1989).

Dole Food Company, Inc. is not a privy to Dole Food Corporation Inc., the nonexistent entity named in the Judgment. See Notice of Removal, Ex. 4 (Decl. of C. Michael Carter) at 150. Nor was Dole Food Company, Inc. a party to the litigation resulting in the Judgment against Dole Food Corporation Inc.[4] See Notice of Removal, Ex. 8B (Judgment) at 200 (entering judgment against "Dole Food Corporation Inc.), 199 (denying intervention by Dole Food Company because it is "not one the companies named in the complaint"), Ex. 5B (Judicial Notice) at 156. Hence, it would violate due process to bind Dole Food Company, Inc., an entity that was neither a party nor a privy to the Judgment, under the Recognition Act or general principles of comity among nations. See Parklane, 439 U.S. at 327 n. 7; Zenith, 395 U.S. at 110; Martin, 490 U.S. at 765.

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[4] Plaintiffs cite Bank of Montreal v. Kough, 430 F. Supp. 1243, 1246-47 (N.D. Cal. 1977) for the proposition that under California law, due process simply requires that the defendant be given actual notice of the complaint and an opportunity to be heard. Pls. Opp. to Dole Food Company's Mot. to Dismiss at 11. This case does not apply here because the Judgment makes clear that Dole Food Company, Inc. was not given an opportunity to be heard because it was not named as a defendant. See Notice of Removal, Ex. 8B (Judgment) at 199.

Finally, Plaintiffs argue that any reference to "Dole Food Corporation" in the Judgment "was clearly an error" which "was in no way prejudicial[.]" Pls. Opp. to Dole Food Company's Mot. to Dismiss at 10. Although the court must "disregard any error, improper ruling, instruction, or defect in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties[,]" this rule does not apply here. See Cal. Civ. Proc. Code § 475. Plaintiffs attempt to enforce a $489.4 million judgment against a non-party based on an affidavit that purports to be a translation of a writ of execution. Because Plaintiffs failed to provide an actual writ of execution, there is no evidence that the Nicaraguan court approved the name changes reflected in the Notary Affidavit. Moreover, if the writ of execution named Dole Food Company, Inc. as a defendant, the alleged "error" in the Judgment clearly would affect the substantial rights of Dole Food Company, Inc., as it was denied intervention because it was not named as a defendant. See Notice of Removal, Ex. 8B (Judgment) at 199, Ex. 5B (Judicial Notice) at 156.

In summary, Dole Food Company, Inc. has presented evidence that it was not a party in the Judgment in Nicaragua.[5] Plaintiffs do not dispute the authenticity of such evidence. It "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" against Dole Food Company, Inc. under the Recognition Act or general principles of comity among nations. See Homedics, 315 F.3d at 1138. Because the deficiencies could not be cured by amendment, Dole Food Company, Inc.'s motion to dismiss with prejudice is granted.

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[5] Because the court finds this ground dispositive, it need not address Dole Food Company, Inc.'s analogy to cases with fictitiously named defendants or its argument based on collateral estoppel. See Dole Food Company, Inc.'s Mot. to Dismiss at 13-14.

2. ***Shell Chemical Company***

Like Dole Food Company, Inc., Shell Chemical Company was not named as a party in Plaintiffs' Nicaraguan complaints. Nor was it served. Nor was it named in the Judgment.[6] Nor do Plaintiffs allege that Shell Chemical Company is a privy to Shell Oil Company. Plaintiffs' arguments against Shell Chemical Company's Motion to Dismiss mirror those against Dole Food Company, Inc.'s. Because Shell Chemical Company was never named in the complaints, served, or named in the Judgment, Plaintiffs have failed to properly plead a cause of action against it. Accordingly, the court grants Shell Chemical Company's motion to dismiss with prejudice.[7]

3. ***The Dow Chemical Company***

Unlike Dole Food Company, Inc. and Shell Chemical Company, "Dow Chemical, also known as Dow Agro Sciences" does appear as a defendant in the Judgment. Notice of Removal, Ex. 8B (Judgment) at 200. The Dow Chemical Company moves to dismiss Plaintiffs' claims under the Recognition Act and general principles of comity among nations, because it "was not served with the complaints on which the underlying foreign judgment is based." The Dow Chemical Company's Mot. to Dismiss at 2.

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[6] The complaints and the Judgment name Shell *Oil* Company, and Plaintiffs concede they served Shell Oil Company, rather than Shell Chemical Company, at the former's Houston offices. Pls. Opp. to Shell Chemical Company's Mot. to Dismiss at 5.

[7] Plaintiffs claim that "Shell Chemical Company's attorney made a general appearance[,]" thereby subjecting it to the jurisdiction of the Nicaraguan court. Pls. Opp. to Shell Chemical Company's Mot. to Dismiss at 11. The Judgment, however, reflects at most that an attorney appeared on behalf of Shell *Oil* Company. Shell Chemical Company's Mot. to Dismiss, Ex. 6B at 224. In any event, it is irrelevant, because the Judgment fails even to mention Shell Chemical Company. Nor need the court reach Shell Chemical Company's argument that the Notary Affidavit does not grant an ascertainable sum of money. See Shell Chemical Company's Mot. to Dismiss at 19.

Under the Recognition Act, a foreign judgment is not conclusive if the "foreign court did not have personal jurisdiction over the defendant[.]" Cal. Civ. Proc. Code § 1713.4(a)(2); Bank of Montreal, 430 F. Supp. at 1246 ("a foreign judgment is not conclusive in California if the foreign court did not have personal jurisdiction over the defendant"); Julen v. Larson, 25 Cal. App. 3d 325, 327 (same). Similarly, under principles of comity among nations, lack of personal jurisdiction "mandates rejection of a foreign judgment[.]" Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997). Foreign courts acquire personal jurisdiction over a defendant by effective service of process. Julen, 25 Cal. App. 3d at 327; see also Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999) ("Service of process, under longstanding tradition in our system of justice is fundamental to any procedural imposition on a named defendant."). Foreign courts may also acquire personal jurisdiction over a defendant who "voluntarily appeared in the proceedings, other than for the purpose of . . . contesting the jurisdiction of the court over him." Cal. Civ. Proc. Code § 1713.5(a)(2).

In response to The Dow Chemical Company's claim that it "was not served with the complaints on which the underlying foreign judgment is based[,]" Plaintiffs argue that they have "properly pled adequate service" and that "is all that is necessary to survive a Motion to Dismiss." Pls. Opp. to The Dow Chemical Company's Mot. to Dismiss at 9. The court, however, may look beyond the pleadings and consider the following as matters of public record: the Record of Service of Foreign Judicial Document, the June 24, 2002 Minute Order by the Nicaraguan court, Dow AgroSciences LLC's Motion to Quash Improper Service, and the Indiana court's Order Granting Dow AgroSciences LLC's Motion to Quash. See Lee, 250 F.3d at 688-89.

Plaintiffs contend that the Order Granting Dow AgroSciences LLC's Motion to Quash "only establishes that Dow AgroSciences LLC was not served." Pls. Opp. to The Dow Chemical Company's Mot. to Dismiss at 9. That document

shows that Plaintiffs attempted to serve The Dow Chemical Company by serving "Dow Agro Sciences, aka, Dow Chemical" in Indiana. See The Dow Chemical Company's Mot. to Dismiss, Ex. 1 (Record of Service of Foreign Judicial Document) at 10. However, Plaintiffs have failed to provide proof of service on The Dow Chemical Company, even after being challenged on this point by Defendants and ordered to do so by this court. See September 29, 2003 Order. Plaintiffs instead submitted the Nicaraguan court's June 24, 2002 Minute Order. The Minute Order recites that "Dow Chemical, also known as Dow Agro Sciences" received notice on February 15, 2002. This document does not constitute proof of service on The Dow Chemical Company. It does, however, establish that the Nicaraguan court failed to recognize that The Dow Chemical Company is an entity distinct from Dow AgroSciences LLC. Plaintiffs' repeated failure to provide proof of service leads to the conclusion that Plaintiffs failed to properly serve The Dow Chemical Company before the Nicaraguan court's default ruling on June 24, 2002.

Plaintiffs nevertheless attempt to resist this conclusion in two ways. First, they argue that procedurally "perfect service" is not required "so long as it can be proven that the party received the complaint[,]" citing Taylor-Rush v. Multitech Corp., 217 Cal. App. 3d 103, 111 (1990). Pls. Opp. to The Dow Chemical Company's Mot. to Dismiss at 11. Taylor-Rush stated that other "evidence of actual receipt may also validate the otherwise defective service, such as where a defendant's attorney acknowledges the defendant's receipt of the summons." Taylor-Rush, 217 Cal. App. 3d at 110-11 (citation omitted). Here, no summons accompanied the attempted service in Indiana. Dow Chemical Company's Mot. to Dismiss, Ex. 1 (Dow AgroSciences LLC's Mot. to Quash Improper Service) at 6. Moreover, the court in Taylor-Rush explained: "A defendant is under no duty to respond to a defectively served summons. The notice requirement is not satisfied by actual knowledge of the action without service conforming to the statutory

requirements, which are to be strictly construed. Taylor-Rush, 217 Cal. App. 3d at 111 (citation omitted); see also Jackson v. Hayakawa, 682 F.2d 1344, 1347 (9th Cir. 1982) (actual notice will not subject defendants to personal jurisdiction if service was not made in substantial compliance with Fed. R. Civ. P. 4) (citation omitted).

Second, Plaintiffs argue that The Dow Chemical Company's appearance in the Nicaraguan action cures any alleged defects in service. Plaintiffs cite Bank of Montreal, 430 F. Supp. at 1246-67, for the proposition that the Constitution requires only actual notice and an opportunity to defend. That case states that a foreign judgment will not be refused recognition if the defendant "prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court[.]" Bank of Montreal, 430 F. Supp. at 1246. Along the same lines, Plaintiffs cite Jackson, 682 F.2d at 1347, to argue that defendants can waive the defect of lack of personal jurisdiction by appearing generally without first challenging the defect in a preliminary motion or responsive pleading.

These cases are inapposite because Plaintiffs have failed to show that The Dow Chemical Company agreed to submit to the personal jurisdiction of the Nicaraguan court before it was held in default. See In re Marriage of Smith, 135 Cal. App. 3d 543, 546 (1982) (even a general appearance after the entry of default based on defective service cannot retroactively cure the defect). Indeed, their pleadings combined with matters of public record prove that the Nicaraguan court held The Dow Chemical Company in default months before the company appeared. Plaintiffs have pled that "as early as October 4, 2002, Dow appeared in the underlying action thereby eliminating any issues surrounding adequate service." Pls. Opp. to The Dow Chemical Company's Mot. to Dismiss at 9. But the Nicaraguan court entered default against "Dow Chemical, also known as Dow Agro Sciences" on June 24, 2002. Triana Decl., Ex. 5 (certified translation of June 24, 2002 Minute Order) at 68.

Because the Nicaraguan court lacked personal jurisdiction over The Dow Chemical Company, the foreign judgment is not conclusive under the Recognition Act and must be rejected under principles of comity among nations. See Cal. Civ. Proc. Code § 1713.4(a)(2); Bank of Montreal, 430 F. Supp. at 1246; Julen, 25 Cal. App. 3d at 327; Wilson, 127 F.3d at 810. Hence, the court grants The Dow Chemical Company's motion to dismiss with prejudice. See Homedics, 315 F.3d at 1138 (dismissal appropriate if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").[8]

IV. CONCLUSION

Accordingly, the court **GRANTS** motions to dismiss with prejudice by Dole Food Company, Inc., Shell Chemical Company, and The Dow Chemical Company.

IT IS SO ORDERED.

DATED: October 20, 2003

Nora M. Manella
United States District Judge

[8] Because the court finds this ground dispositive, it need not reach The Dow Chemical Company's other arguments for dismissal. See The Dow Chemical Company's Mot. to Dismiss at 2 n. 1.

AFFIDAVIT OF SERVICE

DOCKET NO. 2020-P-0229
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In Re Amy Diamond

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I, Elissa Diaz, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

on June 1, 2020

I served the Brief for Defendant-Appellant pursuant to Rule 13(a) of the Massachusetts Rules of Appellate Procedure within in the above captioned matter upon:

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via **Electronic Service** through the efileMA electronic filing system.

Filing has been completed on the same date as above via **Electronic Filing** through the efileMA electronic filing system.

Sworn to before me on June 1, 2020

/s/ Robyn Cocho
_____

/s/ Elissa Diaz

Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2022

David Valicenti
BBO #632980

Job #295017